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THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

THE
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Editorial communications should be addressed to:

THE SECRETARY,
THE BRITISH YEAR BOOK OF INTERNATIONAL LAW,
ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS,
CHATHAM HOUSE,
10 ST. JAMES'S SQUARE, LONDON, S.W. 1.

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THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS

By LORD MCNAIR, Q.C.

Formerly President of the International Court of Justice

THE title of this article will be readily recognized as forming paragraph 1 (*c*) of Article 38 of the Statute of the International Court of Justice, but in the observations that follow it is not proposed to discuss this expression in relation to that context. There is some evidence that it is likely to acquire another sphere of operation, namely, as affording in certain cases the choice of a legal system for the regulation of some of the now numerous contracts made between corporations (or, less commonly, individuals) belonging to countries which have capital and skill to spare, and the Governments of certain countries which have natural resources awaiting development but not enough capital or skill available for that purpose. This choice is not likely to be made when the pair of countries involved, for instance, Great Britain and Italy, have sufficiently modernized their legal systems, so that the contracting parties will be content to adopt one of them for the regulation of the contract or one for certain parts of the contract and the other for other parts. It is more appropriate to a contract in which the legal systems of the two countries involved present a strongly marked contrast, both in content and in stage of development, for instance, the contrast between the law of England or of most of the States in the North American Continent and the law of many Asiatic countries; it is this type of contract with which this article is concerned.

THE ECONOMIC NEED

These contracts are entered into for many purposes and bear many names. Amongst the purposes may be mentioned the development of oil or other mineral resources; the laying of pipe-lines for oil; the development of an uncultivated area for the purposes of agriculture or forestry, &c. Perhaps they are best described as 'economic development agreements'. They are often called 'concessions', but the objection to this term is that it is apt to conceal the bilateral character of the transaction, and moreover it is often used, popularly, to denote the area in respect of which the agreement is made.

It is obvious that this trend of foreign investment will continue, and it is essential that it should have a suitable legal environment. It may be inspired by commercial motives or by a sense of duty to assist in the development of the resources of countries which require external assistance in doing so, or by a mixture of these motives.

In practice it is generally found that the company which undertakes the task of developing the resources of a foreign undeveloped country finds it either desirable or necessary to engage in a very considerable social programme for the purpose of securing decent conditions of life for its employees, including the provision of hospital, education and other social facilities.

From a wide social point of view it is clear that, in the present state of world society and the unequal distribution of capital and industrial skill, it is essential for the securing of a more equitable level of material civilization that the citizens of the more advanced countries (by which I mean materially advanced without suggesting any moral superiority) should engage in this process and receive a proper reward for their technical and financial assistance. It is true that there is always a risk in these transactions that the presence of what a medieval chronicler once described as 'too great might on the one side, and unmight on the other', or too great commercial experience on the one side and lack of it on the other, may have the result of an agreement being entered into which is unfair to the State whose Government becomes a party to it. However, the days when a clever and adventurous prospector could interview an inexperienced tribal chieftain and then return home with a valuable 'concession' in his pocket have gone. To an increasing extent the rulers of the undeveloped or less developed countries have shown themselves to be shrewd and enlightened men, well able to take care of the interests of their countries in a bargain, and assisted by first class legal advice whether from their own compatriots or from foreigners.

Very many such contracts are already in existence and we propose to assume that for some time to come they will represent an economic need and will continue to be entered into.[1] If that assumption is correct, it is of the utmost importance that there should be a general consensus of opinion as to the system of law governing these transactions. It will be submitted in what follows that this consensus of opinion is already emerging, and the object of these observations is to take stock of this trend and indicate the direction which in the best public interest it should follow.

Some Legal Characteristics

Before considering what system of law is the most appropriate for the regulation of these contracts and for the settlement of disputes arising thereunder it is useful to note certain legal characteristics which they commonly present.

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[1] Contracts of this type are not the only form in which this economic need finds expression: see Brandon, *Legal Aspects of Private Foreign Investments* (1955), and literature cited therein; this valuable memorandum has not yet been published.

(*a*) They are made between a Government on the one side and, on the other, a foreign corporation owing its legal existence to the laws of a foreign State and deriving its capital primarily from nationals of that State. They therefore contain a 'foreign element', indeed an international element, using the word 'international' not in the sense of 'inter-state', which is its meaning in the expression 'public international law', but as denoting an agreement the parties to which belong to two different countries.

(*b*) They are not contracts for the carrying out of a single transaction such as the sale and purchase of cotton or wheat or meat or the building of a ship; they provide for some long-term exploitation of natural resources, involving permanent installations and plant which become and remain the property of the foreign corporation for the duration of the contract.

(*c*) They often involve the creation of rights which are not purely contractual but which are more akin to rights of property, such as the right to the possession of large areas of the territory of the contracting State, selected by the foreign corporation, and the right to exercise a considerable amount of control within these areas.

(*d*) They often involve the vesting in the foreign corporation of certain rights of an unusual and semi-political character, for instance, complete freedom to export and import, exemption from all or many forms of taxation, and sometimes even impose upon the corporation a share of responsibility for the maintenance of order and security.

(*e*) It has been pointed out more than once that the peculiarity of many of these economic development agreements is that they are governed in part by public, and in part by private, law.[1]

(*f*) Both in their inception and in their execution they often involve the diplomatic concern or protection of the foreign State to whose laws the corporation owes its existence.

(*g*) The territorial legal systems of the State to whose laws the corporation owes its existence, and of the State in whose territory the corporation is operating, frequently have very little in common, either in content or in the stages of development attained by them. Moreover, it often happens that the corporation is operating in a number of States.

(*h*) Usually, or frequently, provision is made in the event of disputes for arbitration which has the effect of excluding the national courts of both parties.[1]

---

[1] Thus in 1922 in the case of the *Electricity Company of Warsaw, Reports of International Arbitral Awards,* published by the United Nations, vol. iii, p. 1687, the sole arbitrator, G. D. Asser, said: 'la concession accordée par la Ville à la Compagnie a, comme généralement toutes les concessions, un caractère double; elle relève tant du droit public que du droit privé'; and see Kaeckenbeeck, 'The Protection of Vested Rights in International Law', in this *Year Book*, 17 (1936), at p. 11: '. . . concessions are not pure institutions of private law, but present a mixture of private and public legal characters.'

CHOICE OF LAW

One of the difficulties that arises in finding a system of law appropriate to the type of contract under discussion arises from the fact that many of the countries which require skill and capital from outside for the development of their natural resources are governed by some system of law which has not yet been developed to deal with this particular type of transaction. It is believed that the provisions, for instance, of the Islamic law respecting economic development agreements are very inadequate, if indeed there are any at all. Moreover, the content of Islamic law differs according to the particular school of law whose teachings are to be followed, and it is understood that there are at least four schools of law. It is hardly to be expected that the nationals of countries enjoying a well-established system of law, which is familiar with contracts of this type, are likely to be readily disposed to enter into contracts with a foreign Government that are to be regulated by systems of law which are vague and have not been developed in the direction, or to the extent, necessary for dealing with this type of transaction. Accordingly, it is not surprising to find that the negotiators of these contracts, and the tribunals which adjudicate disputes arising upon them, tend to look in some other direction for an appropriate system of law. In this process the first step is to get rid of the notion that the only choice lies between public international law properly so called and the territorial system of law of, or associated with, either of the parties. Private international law is not in itself an alternative, because it does not profess to be a complete system of substantive rules of law; it is adjectival and its duty is to prescribe rules for the guidance of a tribunal in deciding which system of law it should apply for the solution of a question submitted to it that contains a foreign element[2] and with respect to which it has jurisdiction. Nevertheless, private international law can help us in finding a solution.

Professor Jessup has recently shown in his Storrs Lectures, published under the title of *Transnational Law*,[3] that the complexity of the modern world, and in particular the functioning of the domestic tribunals of the numerous international organs which have been created, compel the abandonment of any such facile dichotomy of law into national law and public international law. Tribunals must be left free to develop the system of law which seems to them appropriate to the class of dispute with which they are called upon to deal, and they are doing so rapidly.

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[1] Sometimes expressly; thus Article 17 of the Shufeldt Concession provided that any question arising between the parties 'will not be taken by any means to the Courts of Justice nor shall the case be referred to diplomatic channels but that any question which may arise will be submitted to arbitration'. See *Reports of International Arbitral Awards*, published by the United Nations, vol. ii, p. 1085.

[2] See Chapter I of Cheshire's *Private International Law*.

[3] Yale University Press (1936), particularly Chapter 3.

When we turn to consider what is the appropriate system of law for the regulation of an economic development agreement made with the Government of a country whose legal system is inadequate for the regulation of a contract of this type, it is submitted that an entirely adequate basis for the choice by tribunals of an appropriate system can be found in the intention of the parties, manifested either by express provision in their contract, as sometimes happens, or by implication from the terms of the contract and the nature of the transaction envisaged by it.

In the words of Dicey's Rule 136, the 'proper law of a contract' means (in his *Digest*[1]):

> 'the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended, to submit themselves.'

Sub-Rule 1 refers to their 'expressed intention', and Sub-Rule 2 states that where there is no expressed intention,

> 'their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of contract.'

Sub-Rule 3 states two presumptions as to the proper law which have effect 'in the absence of countervailing considerations'—the first in favour of the *lex loci contractus*, the second in favour of the *lex loci solutionis*.

My submission is that the nature of contracts of this type and the general circumstances surrounding them form 'countervailing considerations' and negative both these presumptions, except in the case of a particular provision which clearly contemplates the law of the place of performance, for instance, the payment of compensation for injuries to workmen employed on this undertaking or the purchase of goods in the country where the undertaking is being carried out.

One consideration which might at first sight seem to be 'countervailing' is the fact that one of the parties to these contracts is a State. This point was considered by the House of Lords in *Rex* v. *International Trustee for the Protection of Bond Holders Aktiengesellschaft*,[2] which arose upon a gold loan issued by the United Kingdom in New York. The House of Lords rejected the view that there was a presumption that English law was the 'proper law' of the contract and held, upon examination of all the circumstances, that the law of the United States was the 'proper law' of the contract. The following remarks were made by Lord Atkin at p. 531:

[1] 6th ed., pp. 579–604.

[2] [1937] A.C. 500.

> 'It cannot be disputed that a Government may expressly agree to be bound by a foreign law. It seems to me equally indisputable that without any expressed intention the inference that a Government so intended may be necessarily inferred from the circumstances: as where a Government enters into a contract in a foreign country for the purchase of land situate in that country in the terms appropriate only to the law of that country: or enters into a contract of affreightment with the owners of a foreign ship on the terms expressed in a foreign bill of lading, or employs in a foreign country foreign labour in circumstances to which foreign labour laws would apply. It appears therefore that in every case, whether a Government be a party or not the general principle which determines the proper law of the contract is the same: it depends upon the intention of the parties either, expressed in the contract or to be inferred from the terms of the contract and the surrounding circumstances, and in the latter case the inference may be drawn that the parties intended a foreign law to apply. The circumstances that a Government is a party is entitled to great weight in drawing the appropriate inference, but it is not conclusive and is only one factor in the problem.'

In the case of the type of contract with which we are concerned in this article there is a special reason why the choice of a system of law should depend on the intention of the parties, expressed or implied, namely, that most of these contracts contain provisions for arbitration. Sometimes the arbitration clause expressly specifies the system of law which should apply; and sometimes, without going so far as that, it contains elements which, though not conclusive, may contribute something to the solution of that problem, for instance, by naming the place of the arbitration, or by investing some person with power to appoint an umpire if the parties or their appointed arbitrators are unable to agree.

If it be true, as is generally recognized, that the submission of a dispute to the jurisdiction of a particular court amounts to an acceptance of the law of that court as the law governing the dispute, it would seem to follow that the submission of a dispute to a tribunal of arbitration involves the acceptance of such system of law as the arbitrators may decide to be the relevant one.

Although it cannot be said that this type of contract is governed by public international law, it is public international law which has given birth to the legal system gradually being recognized as appropriate to it, for Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice which forms the title of this article, merely places on record one of the main sources of the rules of public international law. Indeed, it describes the inexhaustible reservoir of legal principle from which tribunals can enrich and develop public international law. In other words, it is submitted that the legal system appropriate to the type of contract under consideration is not public international law but shares with public international law a common source of recruitment and inspiration, namely, 'the general principles of law recognized by civilized nations'.

Contractual Provisions Indicating a System of Law

It frequently happens that these contracts themselves contain some indication of the legal system within which they are intended to operate. It is often said that the parties to a contract make their own law, and it is, of course, true that, subject to the rules of public policy and *ordre public*, the parties are free to agree upon such terms as they may choose. Nevertheless, agreements that are intended to have a legal operation (as opposed to a merely social operation) create legal rights and duties, and legal rights and duties cannot exist in a vacuum but must have a place within a legal system which is available for dealing with such questions as the validity, application and interpretation of contracts and, generally, for supplementing their express provisions. Often such contracts may give some indication of the legal system within which they, or some part of their provisions, are intended to operate, of which practice the following instances may be given.

Articles 21 and 22 of the Concession granted by the Persian Government on 29 April 1933 to the Anglo-Persian Oil Company are as follows:

'21. The contracting parties declare that they base the performance of the present Agreement on principles of mutual goodwill and good faith as well as on a reasonable interpretation of this Agreement.

'The Company formally undertakes to have regard at all times and in all places to the rights, privileges and interests of the Government and shall abstain from any action or omission which might be prejudicial to them.

'This Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities.

'22. A. Any differences between the parties of any nature whatever and in particular any differences arising out of the interpretation of this Agreement and of the rights and obligations therein contained as well as any differences of opinion which may arise relative to questions for the settlement of which, by the terms of this Agreement, the agreement of both parties is necessary, shall be settled by arbitration.

'B. The party which requests arbitration shall so notify the other party in writing. Each of the parties shall appoint an arbitrator, and the two arbitrators, before proceeding to arbitration, shall appoint an umpire. If the two arbitrators cannot, within two months, agree on the person of the umpire, the latter shall be nominated, at the request of either of the parties, by the President of the Permanent Court of International Justice. If the President of the Permanent Court of International Justice belongs to a nationality or a country which, in accordance with clause C, is not qualified to furnish the umpire, the nomination shall be made by the Vice-President of the said Court.

'C. The umpire shall be of a nationality other than Persian or British; furthermore, he shall not be closely connected with Persia or with Great Britain as belonging to a dominion, a protectorate, a colony, a mandated country or other country administered or occupied by one of the two countries above mentioned or as being or having been in the service of one of these countries.

'D. If one of the parties does not appoint its arbitrator or does not advise the other

> party of its appointment, within sixty days of having received notification of the request for arbitration, the other party shall have the right to request the President of the Permanent Court of International Justice (or the Vice-President in the case provided at the end of clause B) to nominate a sole arbitrator, to be chosen from among persons qualified as above mentioned, and, in this case, the difference shall be settled by this sole arbitrator.
>
> 'E. The procedure of arbitration shall be that followed, at the time of arbitration, by the Permanent Court of International Justice. The place and time of arbitration shall be fixed by the umpire or by the sole arbitrator provided for in clause D, as the case may be.
>
> 'F. *The award shall be based on the juridical principles contained in Article* 38 *of the Statutes* (*sic*) *of the Permanent Court of International Justice.*[1] There shall be no appeal against the award.
>
> 'G. The expenses of arbitration shall be borne in the manner determined by the award.'

An Agreement made in 1930 between the Union of Soviet Socialist Republics and a British company called the Lena Goldfields Limited (which I have not seen) is stated in the Award to have contained an Article (89) whereby it was agreed that

> 'The parties base their relations with regard to this Agreement on the principle of goodwill and good faith as well as on reasonable interpretation and the terms of the Agreement.'

A certain concession granted by a Government in the Middle East provides in its arbitration clause that

> 'The award of arbitration shall be consistent with legal principles familiar to civilized nations.'

A Concession dated 11 January 1939, granted by the Ruler of Abu Dhabi to Petroleum Development (Trucial Coast) Limited, Article 17, contains the following provision:

> 'The Ruler and the Company both declare that they base their work in this Agreement on goodwill and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason.'

(We shall refer presently to the Award of Lord Asquith of Bishopstone in an arbitration arising out of this Concession.)

Article 46 of the Consortium Agreement of 1954 between Iran, the National Iranian Oil Company, and certain other corporations, American, British, Dutch and French, is as follows:

> '*In view of the diverse nationalities of the parties to this Agreement*[2] it shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incor-

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[1] Italics mine.

[2] Italics mine.

porated, and in the absence of such common principles then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals.'

This provision, which presumably emanates from the legal advisers of the Government of Iran and of the corporations above mentioned, represented the views of a group of men all possessing great experience in this type of transaction and appears to afford strong evidence in favour of the general drift of the present argument.

The conclusion drawn from the foregoing examples is that the parties to these contracts were not satisfied to leave their provisions to be governed by the national law of any party, and that they felt the necessity of relying upon a system which may be called the general principles of law as the system within which the agreements were intended to operate.

What is the general inference that can be drawn from the presence and the content of these clauses? They seem to give the following indications:

1. That the parties recognized that the relations between them constituted by these contracts belong to a somewhat unfamiliar legal sphere; they may not have been clear as to the legal system which will govern the rights and duties thereby created but they were reasonably clear that the local law of neither the contracting Government nor of the place of registration of the contracting company would be appropriate; and

2. The recognition that the local or national law of neither party would be appropriate is reinforced by an examination of other provisions of contracts of this type; for instance

(*a*) They nearly always contain a clause providing for arbitration, which in itself affords some, but not conclusive, evidence of the parties' belief in the inadequacy of the national law of either of them.

(*b*) They frequently contain a provision for requesting some international authority, such as the President of the International Court of Justice at The Hague, to appoint an umpire or referee if the parties or their respective arbitrators are unable to concur in appointing a referee or arbitrator.[1] The President of the International Court cannot be expected to know much about a large number of national legal systems, but he can at any rate be deemed to know something about the law referred to in Article 38 of the Statute of his Court.

(*c*) They frequently contain provisions of a semi-political type which would be more appropriate to a treaty than to a commercial transaction, such as a provision which prohibits the company or its officials from interfering with the administrative, political or religious affairs of the country in which it is operating, or provisions whereby the company is empowered to acquire rights in the land and to receive the assistance of the Government in doing so.

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[1] There are many contracts in existence which contain this provision.

If then, as is submitted, one can reasonably infer that the parties do not regard the national law of either of them as affording an adequate or appropriate legal system within which these contracts can operate, and if we may also assume that they contain an international element, what legal system can be regarded as appropriate to govern them? What is the legal system which best satisfies the intention of the parties? One can truly infer from these contracts—both from what they do say and from what they do not say—that the parties are groping after some legal system which is not the territorial law of either party.

The answer to these questions is not that these contracts are governed by public international law *stricto sensu*, for this system is an inter-State system—*jus inter gentes*. It is true that a corporation operating in a foreign country can be said to be under the protection of public international law because it can invoke the diplomatic protection of its own Government if it should meet with wrongful treatment at the hands of the Government of the country in which it is operating; but that is not the same thing as saying that the contract is governed by public international law. My submission is that in contracts of this type the parties, if they specify no particular legal system, intend that their contracts should be governed by the general principles of law recognized by civilized nations.

Some Arbitral Precedents

We shall now look at three arbitrations of disputes arising upon contracts of this type.

The Lena Goldfields Arbitration in 1930.[1] In this Arbitration a tribunal of arbitration had to consider what was the proper law of a concession whereby the Government of the Union of Socialist Soviet Republics granted to a British company exclusive rights of exploration and mining in vast areas of Russian territory. (I have not seen a copy of the Concession.) The Concession Agreement provided for arbitration by a tribunal of three persons, one to be nominated by each party, and the third—the umpire—by mutual agreement of the parties. The parties appointed their arbitrators and agreed upon the umpire. Before the oral argument the Soviet Government withdrew its arbitrator, and the award was made by the umpire and the British arbitrator. The Lena Company contended that its concession had been frustrated and destroyed by legislative and administrative acts directed against the company and claimed compensation.

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[1] *Annual Digest, 1929–1930*, Case No. 1 and 258; London *Times*, 3 September 1930; *Cornell Law Quarterly*, 30 (1950), pp. 31–54; United Kingdom Memorial in the *Anglo-Iranian Oil Company's* case, *I.C.J. Pleadings*, pp. 119–20.

It is believed that the Concession Agreement contained no express provisions regarding the law which should govern it; but by Article 89 of the Agreement it was agreed that 'the parties base their relations with regard to this Agreement on the principle of goodwill and good faith as well as on reasonable interpretation of the terms of the Agreement'. The tribunal of arbitration, consisting of Dr. Stutzer as umpire and Sir Leslie Scott (later Lord Justice Scott), accepted the argument of the Lena Company to the effect that, while on all domestic matters in the U.S.S.R. Soviet law should apply except where it was excluded by the Agreement, for other purposes the 'general principles of law recognized by civilized nations', referred to in Article 38 of the Statute of the Permanent Court of International Justice, should be regarded as the 'proper law' of the concession; found the principle of unjust enrichment (*Enrichissement sans cause*) to be such a 'general principle'; and awarded compensation to the Lena Company.

The distinction drawn between domestic matters regulated by Russian law and the question of the effect of legislative and administrative acts inconsistent with the concession should be noted.

Paragraph 22 of the Award is as follows:

> 'Before drawing final conclusions upon the above-mentioned facts it is desirable to state the legal form in which Lena's claim was presented to the Court. It was admitted by Dr. Idelson, counsel for Lena, that on all domestic matters in the U.S.S.R. the laws of Soviet Russia applied except in so far as they were excluded by the contract, and accordingly that in regard to performance of the contract by both parties inside the U.S.S.R. Russian law was "the proper law of the contract," i.e., the law by reference to which the contract should be interpreted. But it was submitted by him that for other purposes the general principles of law such as those recognized by Article 38 of the Statute of the Permanent Court of International Justice at The Hague should be regarded as "the proper law of the contract," and in support of this submission counsel for Lena pointed out that both the Concession Agreement itself and also the agreement of June, 1927, whereby the coal mines were handed over, were signed not only on behalf of the Executive Government of Russia generally but by the Acting Commissary for Foreign Affairs, and that many of the terms of the contract contemplated the application of international rather than merely national principles of law. In so far as any difference of interpretation might result the Court holds that this contention is correct.'

Thus it appears that the tribunal accepted the submission by Lena that as regards all matters other than domestic matters arising within the U.S.S.R. the governing law was 'the general principles of law recognized by civilized nations'. It then (paragraph 23) pointed out that Lena's main claim was 'put in two alternative ways, preferably the second', and continued:

> 'The first was for damages for breach of contract—viz., the present value of the future profits lost by reason of the Government's acts and defaults. The second was for

restitution to the company of the full present value of the company's properties, by which in the result the Government had become "unjustly enriched." This second formulation of the case rested upon the principle of Continental law, including that of Soviet Russia, which gives a right of action for what in French law is called "*Enrichissement sans cause*"; it arises where the defendant has in his possession money or money's worth of the plaintiff's to which he has no just right.

'This right is recognized and enforced in Germany under Article 812 of the Civil Code. It is also recognized in Scottish (*sic*) law, but not fully in English law; although the English right of action "for money had and received" on "total failure of consideration" often leads to the same result. The principle was discussed and approved in the British House of Lords in the Scotch case of *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding Company, Limited,* [1924] Appeal Cases, p. 226.

'25. The Court finds as a fact that this state of affairs in which Lena found itself in February, 1930, brought about (in the words of Lena's telegram demanding arbitration) a "total impossibility for Lena of either performing the Concession Agreement or enjoying its benefits."

'The Court further decides that the conduct of the Government was a breach of the contract going to the root of it. In consequence Lena is entitled to be relieved from the burden of further obligations thereunder and to be compensated in money for the value of the benefits of which it had been wrongfully deprived. On ordinary legal principles this constitutes a right of action for damages, but the Court prefers to base its award on the principle of "unjust enrichment," although in its opinion the money result is the same. . . .'

It is clear therefore that the tribunal considered itself to be applying not English law nor Russian law but 'the general principles of law recognized by civilized nations'. It is unfortunate that the tribunal was deprived of the assistance of the arbitrator nominated by the Soviet Government, which repudiated the Award but, as the result of negotiations, finally agreed to pay a sum very much less than the amount awarded against it.

Petroleum Developments (Trucial Coast) Limited, and the Ruler of Abu Dhabi,[1] in 1951. Clause 17 of this Concession contained the following passage:

(In the translation submitted by the Company): 'The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner. . . .'

(In the translation submitted by the Ruler of Abu Dhabi): 'The Ruler and the Company both declare that they base their work in this Agreement on goodwill and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason. . . .'

In the opinion of the learned Arbitrator, Lord Asquith of Bishopstone, the variation between these two translations was immaterial, and he and the two parties accepted the latter for the purposes of the case.

One of the questions to which it was necessary for the Arbitrator to address himself was the question of the 'proper law' of the Agreement, upon which his Award contains the following passage:

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[1] For the Award see *International and Comparative Law Quarterly* (1952), pp. 247–61.

> 'What is the "Proper Law" applicable in construing this contract? This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal law of England could apply. On the contrary, *Clause 17 of the agreement, cited above, repels the notion that the municipal law of any country, as such, could be appropriate.*[1] The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of "modern law of nature." I do not think that on this point there is any conflict between the parties.
>
> 'But, albeit English municipal law is inapplicable *as such*, some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence —this "modern law of nature." '

The Arbitrator then discussed the question how far certain particular rules of English Law, though not applicable as such could be regarded as 'principles rooted in good sense and common practice of the generality of civilized nations', and invoked 'the English rule which attributes paramount importance to the actual language of the written instrument . . . '.

Arbitration between the Ruler of Qatar and International Marine Oil Company Limited, in 1953. The Award[2] of the Referee in this case, the Right Hon. Sir Alfred Bucknill, a former Lord Justice of Appeal, which is dated 1 June 1953, contains certain passages throwing further light on the choice of law in cases of this type. It suffices to say that the main question at issue was the construction of certain provisions relating to the payment of sums of money by the company to the Ruler contained in a Concession Agreement made between the respective predecessors of the Ruler of Qatar and the company and referred to in the Award as 'the Principal Agreement'. It is understood that the Agreement (a copy of which is not available to me) contained no provision as to the law governing it or the arbitration. The following lengthy passage requires citation as the Award has not yet been published:

> 'At the conclusion of the arguments, the Arbitrators submitted to me certain questions on which they asked for my decision. I need not set out the exact words of the questions, but merely give the gist of them.
>
> '(1) The first question was whether the proper law to be applied in the construction of the Principal Agreement is Islamic law or the principles of natural justice and equity. On this point the remarks of Mr. Justice Hardy, a Member of the Supreme Court of Oklahoma, in the case of *Bearman*-v-*Dux Oil Co.* decided in 1917, and quoted to me,

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[1] Italics mine.

[2] To be published in *International Law Reports, 1953*.

are apt. The case concerned an oil concession, and Mr. Justice Hardy, in the course of his judgment, said: "On the construction of contracts, it is the duty of the Court to place itself as far as possible in the situation of the parties at the time their minds met upon the terms of the agreement, and from a consideration of the writing itself ascertain their intention, and if this cannot be done by the instrument itself, the circumstances under which it was made and the subject matter to which it relates may be considered, and with these aids it is the duty of the Court so to interpret the contract as to give effect to the mental [?mutual] intention of the parties as it existed at the time of contracting, so far as that intention is ascertainable and lawful".

'There is nothing in the Principal or Supplemental Agreements which throws a clear light upon the intention of the parties on this point. If one considers the subject matter of the contract, it is oil to be taken out of ground within the jurisdiction of the Ruler. That fact, together with the fact that the Ruler is a party to the contract and had, in effect, the right to nominate Qatar as the place where any arbitration arising out of the contract should sit, and the fact that the agreement was written in Arabic as well as English, points to Islamic law, that being the law administered in Qatar, as the appropriate law.

'On the other hand, there are at least two weighty considerations against that view. One is that in my opinion, after hearing the evidence of the two experts in Islamic law, Mr. Anderson and Professor Milliot, "there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments" to quote and adapt the words of Lord Asquith of Bishopstone, in his Award as Referee in an Arbitration in 1951 in which the Shaikh of Abu Dhabi, a territory immediately adjacent to Qatar and in fact much larger than Qatar, was a party, and the Arbitration concerned the interpretation of words in an oil concession contract. I need not set out the evidence before me about the origin, history and development of Islamic law as applied in Qatar or as to the legal procedure in that country. I have no reason to suppose that Islamic law is not administered there strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract.

'Arising out of that reason is the second reason, which is that both experts agreed that certain parts of the contract, if Islamic law was applicable, would be open to the grave criticism of being invalid. According to Professor Milliot, the Principal Agreement was full of irregularities from end to end according to Islamic law, as applied in Qatar. This is a cogent reason for saying that such law does not contain a body of legal principles applicable to a modern commercial contract of this kind. I cannot think that the Ruler intended Islamic law to apply to a contract upon which he intended to enter, under which he was to receive considerable sums of money, although Islamic law would declare that the transaction was wholly or partially void. Still less would the Ruler so intend, and at the same time stipulate that these sums when paid were not to be repaid under any circumstances whatever. I am sure that Sir Hugh Weightman and Mr. Allen did not intend Islamic law to apply. In my opinion neither party intended Islamic law to apply, and [they] intended that the agreement was to be governed by "the principles of justice, equity and good conscience" as indeed each party pleads in Claim and Answer, alternatively to Islamic law, in the case of the Claimant.

'It is interesting to note that in the Agreement which the Ruler made on the 17th May, 1935 [with another company], to which I have referred, there is this express stipulation: "The Shaikh and the Company declare that they base action upon this Agreement on the basis of good faith and pure belief and upon the interpretation of this Agreement in a manner consistent with reason."

'(2) Having decided that Islamic law does not govern the Principal Agreement, the question whether the Principal Agreement is void within the "jurisdiction" of the Arbitration does not arise.

'(3) So also the question whether the Principal Agreement is void under Islamic law does not arise on my decision that Islamic law does not apply.'

Reference should also be made to a decision mentioned in the extract from Professor Charles Rousseau's *Principes généraux du droit international,* which appears later in this article—*Goldenberg & Sons* v. *Germany*[1]—in September 1928. A special arbitral tribunal established in pursuance of the Treaty of Versailles of 1919 had to consider a claim made by a firm of merchants in Roumania against Germany for compensation in respect of the requisition by the German authorities of a quantity of tin before the entry of Roumania into the war. The tribunal, having come to the conclusion that the relevant provision in the Treaty of Versailles required it to award compensation in respect of 'acts committed' contrary to international law, decided to apply not only rules of conventional and customary international law but also, specifically referring to Article 38 of the Statute of the Court, general principles recognized by civilized nations and, as a subsidiary means, judicial decisions, and held that respect for the private property and the acquired rights of foreigners undoubtedly constituted one of these 'general principles'.[2]

The General Principles

It may be asked: What are these 'general principles of law recognized by civilized nations'? Where are they to be found? It is not possible to point to any code or book containing them. Much of the content of public international law proper has been developed by tribunals and by writers out of these general principles,[3] and my view is that the same source will prove equally fruitful in the application and interpretation of those contracts which, though not interstate contracts and therefore not governed by public international law *stricto sensu,* can more effectively be regulated by general principles of law than by the special rules of any single territorial system. They will be developed both by contracting parties who realize the suitability of general principles of law and by tribunals which are called upon to adjudicate upon contracts of this type. I do not propose to prepare a list of the rules of law likely to be recognized as 'general principles'.

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[1] *Annual Digest, 1927–1928,* Case No. 369; *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 1 (2) (1929), p. 87.

[2] Recently in an arbitration arising out of a dispute on a contract between a subsidiary organ of the United Nations and a Lebanese contractor, there being no provision in the contract as to the governing law, the parties agreed by the *compromis* to authorize the arbitrator to apply the general principles of commercial law recognized by civilized nations.

[3] See Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), which is, in effect, a commentary upon Article 38, paragraph 1 (*c*) of the Statute of the Court; see in particular pp. 67–71; see also Bin Cheng, *General Principles of Law* (1953).

'Unjust enrichment' has been referred to above in the *Lena Goldfields* Award, and I shall mention only one other likely candidate, among many, for recognition.

Respect for Acquired Rights[1]

This is a legal doctrine which can be said to have already attained a large measure of recognition as a general principle of law. The doctrine or principle of respect for acquired rights (*droits acquis*) is more familiar to continental lawyers than it is to English lawyers. It cannot be said that English common law or equity is lacking in respect for acquired rights (I say nothing of the legislature), but it has not been considered necessary to formulate our attitude towards acquired rights as a doctrine or principle in the manner adopted by the civil-law countries and accepted by public international law. This principle has frequently been applied by international tribunals to the rights acquired under concessions, and I shall refer briefly to some of the literature and decisions.

Professor Charles Rousseau of the University of Paris deals with the principle of respect for *droits acquis* in his *Principes généraux du droit international*, vol. i (1944), pp. 901–6, and it is important to note the setting in which he deals with this matter. Under the title

'Principes communs à l'ordre juridique interne et à l'ordre juridique international (principes généraux du droit proprement dits)'; he has a sub-title:

> 'Règles tirées du droit des obligations contractuelles ou quasi contractuelles . . . Principes relatifs à l'exercice des droits . . . 2° Respect des droits acquis.'

> '2° *Respect des droits acquis.*—Un autre principe fondamental du droit civil a été élevé par la jurisprudence internationale à la hauteur d'un principe général du droit: c'est celui du respect des droits acquis, dont l'application déborde le cadre du droit international privé. On le trouve consacré par plusieurs décisions internationales.
>
> 'Sans doute, dans son arrêt du 25 Mai 1926 (affaire relative à certains intérêts allemands en Haute-Silésie polonaise, fond), la Cour Permanente de Justice Internationale s'est bornée à déclarer que "(le) principe du respect des droits acquis . . . (faisait) partie du droit international commun" (*Publications de la Cour*, série AB, No. 18, p. 42), sans lui attribuer formellement la qualité de principe général de droit au sens de l'art. 38 de son Statut. De même le Tribunal arbitral de Haute-Silésie, dans une décision du 6 juin 1931, *Niederstrasser* c. *état Polonais*, s'est contenté d'envisager le respect des droits privés acquis par l'État successeur comme un principe de "droit international général' [*Schiedsgericht für Oberschlesien*, vol. ii, No. 3–4, p. 156; *Annual Digest, 1931–1932*, Case No. 33, p. 667]. Mais d'autres décisions ont été plus explicites.
>
> 'C'est ainsi que dans un arrêt du 27 Septembre 1938 *Goldenberg et Fils* c. *État Allemand*, le Tribunal arbitral spécial germano-roumain institué pour connaître des réclamations nées du par. 4 de l'annexe aux art. 297 et 298 du traité de Versailles, a décidé que "le respect de la propriété privée et des droits acquis des étrangers con-

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[1] The usual English equivalent is 'vested rights', but in view of the use of the term 'vested' in English law as the opposite of 'contingent' perhaps 'acquired rights' is the better translation.

> stitue indubitablement un des principes généraux reconnus par le droit international" [*Z. für a. ö. R. und V.*, 1929, p. 87]. Dans le même sens le Tribunal administratif de la Société des Nations, dans sa décision No. 11 du 13 Janvier 1932 sur les droits acquis des fonctionnaires de la Société des Nations, a jugé que les principes généraux du droit "comprennent évidemment le respect des droits acquis par contrat" [*Z. für a. ö. R. und V.*, 1934, p. 153]. . . .'

In the *Oscar Chinn* case,[1] in which Great Britain claimed that certain measures taken by the Belgian Government in relation to navigation on the Belgian River Congo had injured Oscar Chinn, a British subject, who was engaged in the business of transport and shipbuilding on that river, by virtually conferring a monopoly upon a Belgian company contrary to treaty obligations, the decision of the Permanent Court of International Justice against Great Britain turned largely on the fact that Chinn had no concession from the Belgian Government and did not possess 'anything in the nature of a vested right'.

> 'The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position, a change which is said to have led him to wind up his transport and shipbuilding business, is unable to see in his original position—which was characterized by the possession of customers and the possibility of making a profit—anything in the nature of a genuine vested right (un véritable droit acquis).'

Professor Alfred Verdross has described concessions as *droits acquis*.[2]

Dr. Mosler, in his *Wirtschaftskonzessionen bei Anderung der Staatshoheit* (published in 1948), says (at p. 92):

> 'Der Schutz von Konzessionsrechten hat seiner Wurzel in der Achtung der erworbenen Rechte von Privatpersonem.'

It is this quality of the rights of a concessionaire which frequently secures the survival of concessions when the territory on which they are exercised passes from one State to another.[3] The reason usually assigned for this effect is respect for the principle of vested rights or *droits acquis*. Some illustrations will be given.

(i) At the end of the war between Great Britain and the Transvaal Republic the British Government announced their intention of considering each concession granted by the Republic upon its merits. A 'Transvaal Concessions Commission' was appointed and, after examining a large number of concessions, it presented a report,[4] which contains a statement of the principles adopted by it. Subject to certain reservations, e.g. concessions for war purposes, the Commission announced that:

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[1] *P.C.I.J.*, series A/B, No. 63, pp. 65–152, at p. 88.

[2] *Hague Academy Recueil des cours*, vol. 37 (1931), iii, p. 364.

[3] See a Report by Makarov, 'Les changements territoriaux et leurs effets sur les droits des particuliers', in *Annuaire de l'Institut de Droit International* (1950), pp. 208–55, and O'Connell, *The Law of State Succession*, ch. vii, 'The Doctrine of Acquired Rights and State Succession', in this *Year Book*, 27 (1950), pp. 92–124, and 'Secured and Unsecured Debts in the Law of State Succession', ibid. 28 (1951), pp. 204–19, and many authorities there cited. The matter is discussed in Moore, *Digest of International Law*, vol. i, pp. 98, 99, and Hackworth, *Digest of International Law*, vol. i, pp. 562–7.

[4] British Command Paper (Cmd. 623), 1901; see in particular pp. 6–8, 'General Position of Government with regard to Concessions'.

> 'His Majesty's Government in dealing with the concessions in question will probably be willing to adopt the principle which, in the case of the annexation of Hanover by Prussia (the modern case most nearly corresponding with that under consideration) was proclaimed by the conquerors in the following terms: "We will protect everyone in the possession and enjoyment of his duly acquired rights." (Royal Prussian Patent, 3rd October 1866).'

(ii) In 1923 the Permanent Court in its Advisory Opinion on *German Settlers in Poland*,[1] a case involving questions of succession, said that:

> 'Private rights acquired under existing law do not cease on a change of sovereignty.'

(iii) In 1926 the Permanent Court in its Judgment in the case of *German Interests in Polish Upper Silesia*[2] referred more than once to 'the principle of respect for vested rights'. The following passage occurs on page 42:

> 'If Poland wishes to dispute the validity of this entry, it can, in any case, only be annulled in pursuance of a decision given by the competent tribunal; this follows from the principle of respect for vested rights, a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law, which, as regards this point, amongst others, constitutes the basis of the Geneva Convention.'

(iv) In 1929 an arbitration tribunal appointed by the Council of the League of Nations and presided over by M. J. G. Guerrero, later the distinguished President both of the Permanent Court of International Justice and of the International Court of Justice, had to consider the position of a concession held by the Sopron-Koszeg Local Railway Company from the former Austro-Hungarian monarchy. The following passage occurs in the unanimous award[3] of the tribunal:

> 'In principle, the rights which a private company derives from a deed of concession cannot be nullified or affected by the mere fact of a change in the nationality of the territory on which the public service conceded is operated; . . . most authorities and the international judgments which conform most nearly to modern views of international law take this view. . . .'

CONCLUSIONS

We may now sum up by submitting the following propositions:

(1) There is good reason to assert that contracts between corporations belonging to countries having skill and capital to spare and governments of countries needing these commodities for the development of their natural resources will continue to be made.

(2) It is important that the parties to such contracts should be in agree-

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[1] Series B, No. 6, at p. 36.

[2] Series A, No. 7, at pp. 22 and 42.

[3] *American Journal of International Law*, 24 (1930), pp. 164–74; *Annual Digest and Reports of Public International Law Cases, 1929–1930*, Case No. 34.

ment as to the system of law which should govern them and within which they should operate.

(3) That system cannot be public international law *stricto sensu*, as at present understood, because the contracts are not interstate contracts and do not deal with interstate relations.

(4) Where the two countries involved both possess sufficiently developed legal systems, capable of governing contracts of this type, the parties in negotiating the contracts (or tribunals in adjudicating upon them) are likely to adopt one of those systems, or one for certain parts of the contract and the other for other parts.

(5) But when the legal system of the country in which for the most part the contract is to be performed is not sufficiently modernized for the purpose of regulating this type of contract, it is unlikely that the territorial law of either party can afford a solution that will commend itself to the parties or to tribunals (except in regard to some obligation which has special reference to the local law such as the employment of local labour).

(6) Accordingly, the system of law most likely to be suitable for the regulation of the contracts referred to in paragraph 5 and the adjudication of disputes arising upon them is 'the general principles of law recognized by civilized nations'.

REFLECTIONS ON A COMMERCIAL LAW OF NATIONS

By F. A. MANN

I

It is a well known fact that in the course of the last few decades international law has become increasingly concerned with the far-reaching activities of States in the sphere of international economic relations.[1] The creation of numerous organizations and institutions, designed to establish co-operation in such matters as finance and banking, tariffs and taxation, the distribution of commodities or the exploitation of natural resources has been one of the outstanding characteristics of the period. In the wake of these developments States have come to embark upon another, no less significant activity: they have gone into business and entered into contractual arrangements which in many respects do not fundamentally differ from what private traders have practised over the centuries.

It is perhaps too early to say that in consequence of such events a commercial law of nations has sprung into existence, for the available material is still scarce and restricted in scope. Yet it is permissible to suggest that the need for a commercial law of nations can no longer be denied. We are witnessing the growth of activities which occur in what to a considerable extent is a legal vacuum and for which the law remains to be found.

To evolve it or even to indicate its outlines is a task which at this stage would require research on so large a scale as to exceed the capacity of a single student. What can be attempted is no more than a modest introduction to and a preliminary study of some of the types of problems which arise and await solution.

It is for this very limited purpose that it will in the first place be necessary to gather some of the material, taken exclusively from British State practice and selected almost at random, and thus to draw attention to the nature of the legal inquiry to which the facts of international life give rise (Section II). Against the background of what is no more than a compilation it will be possible to draw some conclusions relevant to the general law of treaties (Section III) and thereafter to comment on the broad lines of approach which the commercial law of nations seems to demand (Section

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[1] Schwarzenberger, 'Standards of International Economic Law', *International and Comparative Law Quarterly*, 2 (1948), p. 402; Alexandrowicz, 'International Economic Organisations'; Scheuner, 'Die Völkerrechtlichen Grundlagen der Weltwirtschaft in der Gegenwart', *Verhandlungen des 40. Juristentags* (1953); Erler, *Grundprobleme des Internationalen Wirtschaftsrechts* (1956). These contributions are largely descriptive in character.

IV). This will lead to a discussion, by way of illustration only, of a modern case which will provide the opportunity of indicating methods for the application of theory to practice (Section V). Finally, the challenge which the commercial law of nations extends to lawyers will be re-stated in a few words of explanation (Section VI).

The commercial law of nations which this article has in view is understood as an ill-defined, though not a separate, branch of international law. To attempt to define its scope would be an unprofitable undertaking. In many continental legal systems, it is true, commercial law has a clear meaning: the commercial codes in force in France, Italy, or Germany define the particular persons or transactions to which they are intended to apply. In England, however,

> 'the area which is covered by the term "commercial law" is a matter of uncertainty. The use of the phrase "commercial law" is, of course, purely conventional, and to speak of "commercial law" as a separate branch of the common law is in any event unscientific. In our English legal system "commercial law" is merely an extension of the general principles of the law of contract to special transactions of a mercantile character.'[1]

Or, as another writer has put the point,[2] the selection of the portions to be included in commercial law

> '. . . is quite arbitrary. The law of England does not recognise any particular part of its system as being especially adapted to the requirements of persons engaged in commerce. Different writers upon the subject have accordingly differed in their views as to what part of the law ought properly to be included in a textbook on commercial law.'

In international law, as is to be expected, the position is almost identical with that prevailing in England. If a book on international commercial law came to be written it might well include the law relating to certain international organizations, just as English books on mercantile law deal with partnerships or companies. Again, it would be necessary to discuss not only customary rules of the commercial law of nations, such as minimum standards, but also the meaning and effect of conventional clauses, such as the most-favoured-nation clause or clauses guaranteeing national or equitable treatment, in the same way as an English book on mercantile law may analyse standard conditions in contracts. Furthermore, such a book would include a large part of the general law of treaties, just as some English authors on commercial law think that 'there is general agreement that the general principles of the law of contract . . . should be included in the subject',[2] though in the opinion of others only specific contracts, such as guarantees, bills of exchange, contracts of insurance and affreightment, should be covered by the subject.[3] In short, the commercial law of nations, like English commercial law, exists even in the absence of definition and comprises a variety of subjects which to some extent writers may determine according to their predisposition, on the selection of which opinions are likely to differ, but which, by and large, are characterized by their mercantile nature, by 'a predominant economic element',[1] by their similarity with what occurs in the sphere of private law.

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[1] Gutteridge, *Law Quarterly Review*, 51 (1935), p. 91.

[2] Slater, *Mercantile Law* (13th ed., by Lord Chorley and O. C. Giles, 1956), p. xxxix.

[3] This is the course followed by Smith's *Mercantile Law* (13th ed., by Gutteridge, 1931).

Throughout the following discussion an assumption will be made which should be clearly understood. In an earlier article[2] it was suggested that, firstly, contracts made between States and private persons may be subject to public international law and, secondly, contracts between States in regard to matters of a non-political, commercial character may be governed by municipal law, the applicability of the one or the other legal system being determined by the intention of the parties. In the present article which is exclusively concerned with contracts between States or other international persons, the problem of the choice of law will not be further considered. It will be assumed that the contractual relationship between the States is governed by public international law. On this footing there arises the entirely distinct question of what are the substantive rules of public international law that are applicable to a commercial transaction between States. In an indirect way, however, a discussion of the commercial law of nations is likely to have the incidental effect of making a contribution to the problem of the choice of law considered thirteen years ago. The first limb of the rule then suggested, viz. the possibility of contracts between States and private persons being subject to public international law, met, it is true, with some approval[3] and found significant expression in an Award made by Lord Asquith of Bishopstone, when he said of a concession granted by a State to a private person that it was subject to 'principles rooted in the good sense and common practice of the generality of civilised nations,—a sort of "modern law of nature"'.[4] But the rule has been criticized by others[5] on the ground that in fact public international law does not include a sufficiently developed body of law capable of governing the relationship between States and private persons. This criticism would lose much of its force if it should appear that such a body of law does exist and, indeed, must exist to regulate such commercial arrangements between States as are subject to public international law. The commercial law of nations which, in the appropriate cases, governs the relationship between States and which, admittedly, is in *statu nascendi*, also applies to the relationship between States and private persons.

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[1] Schwarzenberger, loc. cit., pp. 405, 406.

[2] This *Year Book*, 21 (1944), p. 11.

[3] Jessup, *A Modern Law of Nations*, p. 139.

[4] In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, *International and Comparative Law Quarterly*, 1 (1952), p. 247, at p. 251.

[5] Martin Wolff, *Private International Law* (2nd ed., 1950), p. 417, and *Transactions of the Grotius Society*, 35 (1950), pp. 143, 150–2; Fawcett, this *Year Book*, 44 (1948), p. 44, note 3; Friedmann, *American Journal of International Law* (1956), pp. 483, 484.

II

There exist grounds for the suspicion that the archives of the British Government contain the texts of many treaties which would be of great value for the present discussion, but which have never been published.[1] Charterparties made during the war under Lend-Lease, bulk-purchasing contracts entered into by the Ministry of Food, agency agreements whereby the Custodian of Enemy Property collected monies on behalf of foreign Governments, are probably so buried. Although it is to be hoped that these and similar documents will soon see the light of day, it may properly be claimed that the published material is amply sufficient to justify and permit preliminary classification:

Sale. On 4 March 1948 the Government of the United Kingdom and the Royal Danish Government entered into an Agreement to make further provision for the supply of certain aircraft and equipment to Denmark.[2] The two governments agreed as follows:

Article 1

'1. Subject to the provisions of paragraphs 2 and 3 of this Article, the Government of the United Kingdom agree to sell, and the Royal Danish Government agree to purchase, the aircraft and equipment specified in the Appendix to this Agreement.

'2. The aircraft and equipment specified in the Appendix shall be delivered as soon as possible, and the Government of the United Kingdom will endeavour to complete deliveries within six months from the date of signature of this Agreement, or the date of return by the representatives of the Royal Danish Government of approved schedules referred to at Note 2 of Appendix hereto, whichever is the later. In the event of unforeseen shortages arising every effort will be made by the Government of the United Kingdom to find acceptable substitutes.

'3. The aircraft and equipment specified in the Appendix and any substitutes therefor which may be supplied in accordance with paragraph 2 of this Article shall be in accordance with Royal Air Force standards of serviceability; nevertheless the Royal Danish Government shall be entitled to appoint a receiving commission in the United Kingdom to whom the United Kingdom Government shall, on request, afford reasonable opportunity to inspect any aircraft, mechanical transport vehicle, or other major item of equipment, prior to delivery. The quantities of items of equipment to be supplied shall be calculated from Royal Air Force consumption data and based on Royal Air Force rates of effort.

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[1] See, e.g., the extracts from the Anglo-Greek Shipping Agreement of 20 May 1941 reported in *Royal Hellenic Government* v. *Vergottis* 78 (1945), Ll. L. R. 292.

[2] Cmd. 7660. This is the latest version of an agreement of sale. For earlier versions see Agreement between the United Kingdom and Denmark for the Supply of Aircraft, 16 August 1946, Cmd. 7141, and Agreement between the United Kingdom and the Netherlands, concerning the Supply of Aircraft and Equipment, 4 December 1946, Cmd. 7011.

'4. If the Royal Danish Government desire any aircraft or equipment specified in the Appendix to be delivered by air, such delivery shall be at the expense and risk of the Royal Danish Government whether or not the aircraft are flown by pilots of the Royal Air Force.

'5. In so far as the aircraft and equipment specified in the Appendix of the Agreement includes items of equipment which have been obtained by the Government of the United Kingdom from the Government of the United States of America on Lend-Lease terms, the delivery and price of such items will be subject to the completion by the Government of the United Kingdom of appropriate arrangements with the Government of the United States. If any such items are not available from existing United Kingdom stocks and no acceptable substitutes can be found, the Government of the United Kingdom will refund to the Royal Danish Government a sum equivalent to the value of such items as included in the Agreement.

'6. Subject to paragraph 4 above, the aircraft and equipment to be supplied shall, if coming from the United Kingdom or from a source outside Europe, be delivered by the Government of the United Kingdom free alongside ship at the port of embarkation; or if coming from the United Kingdom will be delivered to a station or depot in the United Kingdom if so required by the Royal Danish Government. The cost of all shipment, including any handling or dock charges and the risks of transport from the point of delivery to Denmark, shall fall upon the Royal Danish Government. Aircraft and equipment to be supplied and coming from Royal Air Force Depots or Units in Europe or to be delivered to a station or depot in the United Kingdom shall be deemed delivered by the Government of the United Kingdom at those depots or units and the Royal Danish Government shall assume the cost and all risks of transport to Denmark; such conditions apply equally in those instances where sea transportation is arranged by the Government of the United Kingdom.

'7. It is the intention of the two Governments that all aircraft shall be delivered by air from the United Kingdom, and that as far as possible all the equipment should be supplied from sources in the United Kingdom or in Europe and should be delivered to ports of embarkation to be agreed upon between the Government of the United Kingdom and the receiving commission referred to in paragraph 3 above.

Article 2

'1. The Royal Danish Government will pay for the aircraft and equipment specified in the Appendix the sum of £225,000 to the Government of the United Kingdom.

'2. The above-mentioned sum of £225,000 is payable in sterling in two instalments as follows: (*a*) £168,750, (*b*) £56,250. Payment of the sum of £168,750 as an advance was effected on 31st December 1947; and payment of the balance of £56,250 shall be made not later than 31st October 1948.

Article 3

'The present Agreement shall come into force as from this day's date.

'In witness whereof the undersigned, duly authorised by their respective Governments, have signed the present Agreement and affixed thereto their Seals.

'Done in London in triplicate this fourth day of March 1948.'

Agreements for sale are also sometimes included in treaties which primarily cover other transactions. Thus in a treaty between the United Kingdom and Portugal the latter agreed 'to sell to the Rhodesia Railways the section of the line between Umtali and the frontier of Mozambique on conditions to be agreed between the two Governments'.[1] The Agreement between the United Kingdom and the Republic of Iceland concerning the transfer of Reykjavik Airfield to the Icelandic Government[2] provides that, on the one hand, the Reykjavik airfield, runways and all immovable installations constructed thereon and owned by the United Kingdom shall 'revert to and become the property of the Republic of Iceland without any payment' and, on the other hand, all movable installations and equipment and a Direction Finding Station shall be made available to Iceland 'at a price to be agreed upon separately'.

Barter. The most conspicuous instance of an agreement for the barter of goods is contained in the Agreement which the Government of the United Kingdom and the Government of the United States of America concluded on 23 June 1939 to provide for the exchange of cotton against rubber.[3] The United States Government undertook to supply to the Government of the United Kingdom 600,000 bales of raw cotton, the price to be fixed on the basis of the average market price for spot delivery at New Orleans. The Government of the United Kingdom undertook to supply to the Government of the United States rubber in bales 'to a value equivalent to that of the total value of the cotton'. The Agreement contains detailed provisions on the calculation of prices, the quality of the goods, inspection and acceptance, settlement of disputes about quality 'in accordance with the normal custom of the trade', disposal of stocks and other matters.

An Agreement of a similar nature was made between the United Kingdom and the United States of America on 5 June 1956 for the sale by the latter of $12 million worth of tobacco.[4] The sterling equivalent of the dollar cost, calculated 'at the buying rate for telegraphic transfers on New York in the London market at the close of business on the dates of such dollar disbursements', was to be deposited to the account of the United States Government. It was to be made available to the United Kingdom 'for the procurement of military facilities for the common defence' and for this purpose to be used for the construction of 'military dependents' housing and/or community facilities' of the United States Air Force stationed in the United Kingdom 'at the nominal rent of £1 per unit per annum for as long as and to the extent that they may be required in connection with the presence in the United Kingdom of units of the United States military forces'. The two Governments agreed, *inter alia*, to 'take reasonable precautions to ensure that no sales of tobacco within the terms of this Memorandum will unduly disrupt world prices of tobacco, displace usual tobacco marketings of the United States or other friendly countries or materially impair trade relations among the countries of the free world'.

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[1] Article IX of the Agreement of 17 June 1950, Cmd. 7983, referred to below, p. 28.

[2] Agreement of 4 July 1946, Cmd. 6994, which was substituted for an earlier Agreement of 12 October 1944, Cmd. 6993.

[3] (23 June 1939), Cmd. 6048.

[4] (5 June 1956), Cmd. 9793.

Loans. Loan agreements are among the oldest commercial agreements made between States and British practice supplies numerous examples; the existence of the European Payments Union has recently led to a series of such agreements.[1] Usually they provide for the granting of a loan, whether by the advance of specific sums or by allowing the borrower State to draw upon a credit opened in its favour.[2] Other agreements are more elaborate and envisage the issue of promissory notes by the debtor Government.[3] Sometimes the economic effect of a loan is achieved by a transaction of a different legal character, viz. the purchase by the lender State of promissory notes issued by the borrower State.[4] Ancillary clauses relate to interest and its calculation,[5] the assignability of promissory notes,[6] the purposes for which the loan is to be used,[7] exemption from taxation or transfer restrictions and similar privileges.[8]

In this connexion it is necessary to mention agreements made after the date of the loan and regulating the method of discharge. A particularly elaborate type is an Agreement with Belgium which imposes a duty upon the United Kingdom to repay a loan of 1,250 million Belgian francs by causing British manufacturers to deliver to the Belgian Government certain defence equipment and by settling their invoices, but so that the United Kingdom 'assumes responsibility for the execution of the orders'.[9] In one case a novation agreement was made whereby the borrower undertook to pay the equivalent of the loan in local currency and to make it available for the purchase of local goods.[1] In another case the repayment of the loan was deferred by the issue of new promissory notes.[2]

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[1] Agreements between the United Kingdom and the Netherlands (9 July 1954), Cmd. 9266; Belgium (9 July 1954), Cmd. 9279; Germany (10 July 1954), Cmd. 9267; Switzerland (16 July 1954), Cmd. 9254.

[2] For recent instances see Loan Agreement between the United Kingdom and Spain, 18 March 1940, Cmd. 6230; Agreement between the United Kingdom, France and Poland for a Loan to Poland, 7 September 1939, Cmd. 6110; Agreement between the United Kingdom and Turkey regarding an Armaments Credit for Turkey, 27 May 1938, Cmd. 6119; Agreement between France, The United Kingdom and Turkey, 19 October 1939, Cmd. 6165; Financial Agreement between the Governments of the United States and the United Kingdom, 6 December 1945, Cmd. 6708; Loan Agreements between the United Kingdom and the Export-Import Bank of Washington, 26 October 1948; 16 February 1949; 26 January 1950; 20 September 1950, Cmd. 8126; 25 February 1957, Cmnd. 104; Exchange of Letters between the United Kingdom and the United States of America on the subject of a loan for the development of certain port facilities in Kenya and Tanganyika, 26 June 1953, Cmd. 8965; Agreement between the United Kingdom, Australia, India, Pakistan, Ceylon and Burma regarding a Loan to Burma, 28 June 1950, Cmd. 8007.

[3] See the Agreements included in Cmd. 8126 and referred to in the preceding note or Loan Agreement between the United Kingdom and Belgium, 7 September 1949, Cmd. 8365.

[4] Exchange of Notes between the United Kingdom and Yugoslavia for the granting of credits to Yugoslavia: 26 December 1949, Cmd. 7880; 28 December 1950, Cmd. 8149; 11 January 1951, Cmd. 8172; 10 May 1951, Cmd. 8313.

[5] See, for example, Article 2 of the Agreement with Turkey, Cmd. 6119; Article 3 of the Agreement with Spain, Cmd. 6230; Article 5 of the Agreement with Burma, Cmd. 8007.

[6] See, for example, Article 6 of the Agreement with Belgium, Cmd. 8365.

[7] See, for example, Clause 5 of the Agreement with the United States of America, Cmd. 8965.

[8] See, for example, Article IV of the Agreement with Belgium, Cmd. 9258.

[9] Agreement between the United Kingdom and Belgium, 30 June 1952, Cmd. 9258.

Lease. Leases have also long been known to international practice.[3] Yet it seems appropriate to draw attention to some modern examples. Among them pride of place belongs to the remarkable arrangements which the United Kingdom and the United States of America made on 27 March 1941 relating to the bases leased to the United States in the West Indies and Newfoundland. The transaction was preceded by an Exchange of Notes of 2 September 1940[4] which provided for the transfer of fifty United States destroyers to the United Kingdom. The Agreement relating to the bases leased to the United States is a document of considerable length.[5] By Article I it confers upon the United States

> 'all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the Leased Areas, which are necessary to provide access to and defence of the Leased Areas or appropriate for control thereof'.

There follow provisions about non-user, jurisdiction, security legislation, arrest, service of process, shipping and aviation, immigration, customs and other duties, abandonment, removal of improvements, assignment and underletting and numerous other matters. The Annex to this Agreement contains the forms of leases which were executed. The operative words of the lease relating to Newfoundland, for instance, are:

> 'witnesseth that in consideration of the premises the Newfoundland Government hath demised and leased and by these presents does demise and lease unto the United States of America all those six several pieces or parcels of land (hereinafter referred to as the Leased Areas) described in the Schedule to these presents and delineated on the plans hereto annexed: TO HAVE and TO HOLD the same for the full end and term of ninety-nine years to begin and to be computed from the date of these presents free from the payment of all rent and charges other than compensation as aforesaid AND the United States of America agrees that it will not during the term hereby granted use the Leased Areas nor permit the use thereof except for the purposes specified and on the terms and conditions contained in the aforesaid Notes and Agreement, which are incorporated in

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[1] Exchange of Notes between the United Kingdom and Turkey constituting an agreement regarding the repayment of certain credits granted to Turkey relating to armaments, 11 February 1954, Cmd. 9120.

[2] Exchange of Notes between the United Kingdom and Turkey regarding certain financial obligations of the Yugoslav Government, 22 December 1954, Cmd. 9382.

[3] See Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 181 et seq. A lease is also included in the Anglo-Belgian treaty referred to below, p. 28, note 4. It amends a similar Agreement of 15 March 1921 (Treaty Series, No. 11 (1921), Cmd. 1327) and provides that a site in the port of Dar-es-Salaam 'shall be leased in perpetuity to the Belgian Government at a rent of one franc per annum'. The Agreement includes an interesting interpretative Note on the assignability of the Belgian rights under the treaty of 1921.

[4] Cmd. 6224.

[5] Cmd. 6259 as amended by Cmd. 7000 and Cmd. 8076.

and form part of these presents except such parts thereof as refer specifically to territory other than Newfoundland.'

Since then the United Kingdom has entered into treaties in the nature of tenancy agreements for the establishment of long-range proving grounds for guided missiles with the United States of America relating to the Bahama Islands[1] and with the Dominican Republic.[2]

Work and Labour. Among treaties similar to contracts for work and labour[3] the most interesting is perhaps the Agreement between the United Kingdom and Belgium relative to the construction of a deep-water quay at the Port of Dar-es-Salaam for the use of the Belgian Government.[4] The Government of the United Kingdom undertook to cause to be built for the use of the Belgian Government a deep-water quay on a site leased to the latter.[5] The British Government was to negotiate and conclude the necessary contracts 'in such terms as it shall consider most appropriate', but only after consulting the Belgian Government, and further was to ensure that the quay 'shall be of design and capacity similar to the two quays at present under construction and shall be equipped in substantially the same manner'. The Belgian Government accepted sole responsibility for the cost of the construction and equipment and agreed to reimburse the British Government. The quay will, however, 'be operated and maintained by or on behalf of and at the cost of the Belgian Government'.

A more complicated Agreement was made between the United Kingdom and Portugal relative to the Port of Beira and Connected Railways.[6] By Article III the Portuguese Government undertook

> 'to maintain the Port of Beira and the Beira Railway in a state of efficiency adequate to the requirements of the traffic proceeding to or from Southern Rhodesia, Northern Rhodesia and Nyasaland, to which end they will promote the execution of the works and the acquisition of the equipment necessary for the technical and economic development of the Port of Beira and the Beira Railway and in order to expedite the handling of cargoes and clearance of ships and railway traffic'.

On the other hand, among the duties assumed by the British Government there is, in particular, an obligation to avoid discrimination 'against traffic for which the Port of Beira, on account of its proximity to sources of consumption or origin, is the natural inlet or outlet'. The Agreement provides for the establishment of a free zone, for the appointment of an Advisory Board and other incidental matters.

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[1] Cmd. 8109 and Cmd. 9810 where certain other agreements are referred to.

[2] Cmd. 8546.

[3] See also the Agreement between the United Kingdom and Egypt regarding the construction of the Owen Falls Dam in Uganda, Cmd. 9132.

[4] (6 April 1951), Cmd. 8240.

[5] In exchange for the site referred to in the 1921 treaty: above, p. 27, note 3.

[6] Cmd. 7983.

Exchange of information. In industrial life it has become a matter of frequent occurrence that undertakings interested in a particular field of research and technical development enter into agreements for the exchange and joint exploitation of knowledge; by the nature of things such agreements are usually of considerable complexity. The examples which are met in the sphere of public international law are of no different character.

In August 1942 the United States of America and the United Kingdom signed an Agreement for the Interchange of Patent Rights and Information,[1] which was re-formulated by a further Agreement made in March 1946.[2] Its overriding term was that 'each Government, in so far as it may lawfully do so, will procure and make available to the other Government, for use in war production, patent rights, information, inventions, designs or processes requested by the other Government'. Each Government was to bear the cost of the procurement of such rights from its own nationals. There followed detailed provisions about the manner in which the rights were to be exploited, the terms on which the rights were to be acquired, the indemnities to be provided by the respective Governments and similar matters.

After the war the same Governments entered into an Agreement on the Principles applying to the Exchange of Information relating to the synthesis of Penicillin.[3] 'All information pertaining to the purification, structure and synthesis of penicillin and/or a therapeutic equivalent' was to be exchanged during the period from 1 December 1943 to 31 October 1945.[4] Neither Government was to permit the transmission of information to persons who had not concluded a standard form of agreement with either of the two Governments. The Agreement also provided for the disposition of patent rights and the grant of licences.

Another Agreement made in January 1953 between the United States of America and the United Kingdom relates to the facilitation of the interchange of patents and technical information for defence purposes.[5] Finally, there comes a whole series of Agreements for Co-operation in the peaceful uses of Atomic Energy. The United States of America, which by July 1955 had entered into twenty-six agreements of this kind,[6] made its agreement with the United Kingdom on 15 June 1955[7] and, subsequently, the United Kingdom concluded similar agreements with a number of countries, e.g. with Belgium.[8]

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[1] Cmd. 6392.

[2] Cmd. 6795.

[3] Cmd. 6757.

[4] It appears, therefore, that by the time the treaty was made the period of exchange had already expired.

[5] Cmd. 8757.

[6] See Wit, 'Some International Aspects of Atomic Power Development', in *Law and Contemporary Problems*, 21 (1955), pp. 148, 175 et seq.

[7] Cmd. 9560 as amended by Cmd. 9677 and 9789. See also Cmnd. 20.

[8] Cmd. 9632 as amended by Cmd. 9794.

III

The first question to which the preceding survey of some commercial treaties (a term not intended to be synonymous with treaties of commerce) gives rise is whether and to what extent they throw light on international law in general, namely, on those problems which are common to all treaties of whatever description.

For this purpose it would not be fruitful to devote attention to the effects of such matters as formation, mistake, fraud or duress, discharge, waiver, estoppel, damages, limitation of claims and so forth—matters which the practice and literature of international law have for long had occasion to consider. They arise independently of the character and terms of a particular treaty. The commercial law of nations cannot probably make any particular contribution to their treatment by public international law as a whole. Nevertheless, there are certain other rules of customary international law the establishment and clarity of which has much to gain from the commercial law of nations.

1. In the first place it appears that the doctrine of consideration finds no room in international law.[1] It is true that, at any rate in Anglo-American practice, lip-service is sometimes paid to that doctrine. Thus the Note[2] with which the United States of America accepted the British proposal for the leasing of bases and facilities in the Western Hemisphere states that 'in consideration of the declarations quoted above the Government of the United States will immediately transfer to His Majesty's Government Fifty United States Navy Destroyers generally referred to as the twelve-hundred tons type'. And the Lease,[3] or rather the 'Indenture of Lease', as it was called in this single case, which in pursuance of the same arrangements Newfoundland executed in favour of the United States of America, 'witnesseth that in consideration of the premises the Newfoundland Government hath demised and leased and by these presents does demise and lease unto the United States of America' the Leased Areas. But these are exceptional cases which do not in any way indicate that consideration was treated as a customary rule of law. Had it been so regarded it would surely have found its way into the Loan Agreements which do not record a loan, but the promise to make a loan.[4] In none of these Agreements, not even in those made between Great Britain and the United States of America, consideration is mentioned.

2. On the other hand, one of the essential requirements of a treaty, as of a contract in private law, is an intention to create legal relations. Whether

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[1] Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 177, 178.

[2] Above, p. 27, note 4.

[3] Above, p. 27.

[4] Under English law such a promise would not be enforced by an order for specific performance. It is believed that no such rule prevails in public international law.

or no such intention exists is a matter of construction. In private law the existence of that intention is presumed. It is believed that a similar presumption prevails in public international law.

Sir Hersch Lauterpacht has suggested[1] that such a presumption arises only if a treaty is registered with the United Nations in accordance with Article 102 of the Charter. It would seem to be more likely, however, that the registration of a treaty does not add to, and that the failure to register does not detract from, the contractual character of a treaty. The function of registration is merely to achieve publicity, to preclude or minimize secret arrangements. Consequently registration has no bearing upon the legal character of the document: a mere statement of policy should not be presumed to have contractual character if it is registered and the legal effect of a contractual obligation *stricto sensu* should not be presumed to be diminished if the treaty remained unregistered. Hence it must be doubted, with respect, whether the presence or absence of registration permits or negatives a presumption on the point under discussion.

Moreover, it may be difficult to accede to the suggestion,[2] made apparently *de lege ferenda*, that international agreements are presumed not to create legal relations and that this presumption can be rebutted only if the agreement is governed by public international law, the general principles of law or a specific system of municipal law, or if the parties have provided for the compulsory judicial settlement of disputes. The former of these conditions does not seem to do more than to state the obvious: all international agreements must be governed by some system of law; an agreement governed by no system of law is unthinkable. The presumption would, therefore, always and automatically be rebutted. The latter condition is derived from the mechanical application to international disputes of experience gained in private law. It involves, in effect, the adoption of the view that there can be no law where there is no possibility of compulsory enforcement. It thus attaches too much significance to the question of jurisdiction. The binding character of customary international law 'does not depend upon the existence of a compulsory machinery'[3] for its enforcement. And if States set up a judicial or arbitral tribunal to decide an actual dispute arising from a treaty they recognize rather than create the legal character of the treaty. In other words, the submission of an existing dispute to judicial or arbitral jurisdiction cannot convert a non-contractual arrangement into a contract. Jurisdiction in international law is a distinct issue, a matter of procedure rather than a matter of substantive law. Even an arrangement between two States who have accepted the Optional Clause

[1] *Second Report on the Law of Treaties*, U.N. Doc. A/CN/4/87, pp. 4 et seq.

[2] Fawcett, 'The Legal Character of International Agreements', in this *Year Book*, 30 (1953), p. 381.

[3] Lauterpacht in *Second Report* (quoted above, note 1), at p. 10.

without qualification would not have contractual character if on its true construction it appeared to be a mere statement of policy. Similarly, a tribunal would not necessarily be precluded from treating an arrangement as non-contractual, although it includes an express submission to compulsory jurisdiction.

3. Another essential requirement of a treaty, as of a contract in private law, is a sufficient degree of certainty: its terms must be ascertained or capable of being ascertained.

The fact that obligations imposed by a treaty are 'indefinite and elastic' or 'can be fulfilled by a somewhat nominal act of the parties'[1] does not, as Sir Hersch Lauterpacht has pointed out, render a treaty so uncertain as to lead to unenforceability. Whether a State has discharged its duty to co-operate 'to the fullest degree'[2] can be ascertained by a tribunal. Similarly, by a Treaty of 31 March 1936 the United Kingdom sold to Iraq the railway system of Iraq for a sum of £400,000, one of the terms being that certain posts were for twenty years to be filled by British subjects 'on equitable conditions'.[3] This phrase supplies an objective standard, so that the terms, though *prima facie* uncertain, could, if necessary, be rendered certain by a decision of a tribunal. A treaty which creates nothing but mutual duties to consult or to negotiate about certain matters or in certain contingencies would give rise to contractual obligations. They would not be far-reaching, but they are capable of being defined and they must be discharged in good faith. They are light, but not uncertain in character. This applies even more strongly where, as frequently happens in the case of commercial treaties,[4] the arrangements between the parties include clauses providing for consultation or further negotiations. Such clauses do not in any way detract from the binding and enforceable character of the instruments in question.

Much more difficult problems arise where *prima facie* the subject-matter of the obligation is undefined. There are instances of treaties whereby Governments have agreed to make available to each other 'such equipment, materials, services or other military assistance as the contracting Government furnishing such assistance may authorize in accordance with detailed arrangements from time to time to be made between them'.[5] It would seem very likely that these words introduce so strong an element of uncertainty that they are incapable of objective definition and the agreement is unenforceable. It does not help to describe such clauses as being in the nature of a *pactum de contrahendo*, for even such a *pactum* has no legal effect unless it incorporates all the essential terms of the final contract. The Agreement between the United Kingdom and Iceland relating to the Reykjavik Airfield[1] confers upon Iceland the right to purchase certain installations 'at a price to be agreed separately'. Or by Article IX of the Convention between the United Kingdom and Portugal relative to the Port of Beira,[2] Portugal, as has been pointed out above, agreed to sell a certain section of a railway line 'on conditions to be agreed between the two Governments'. It may be a possible conclusion that, in the absence of agreement between the parties, the express terms are so indeterminate as to render the clause ineffective and unenforceable; in that event the further question arises whether the treaty as a whole is ineffective or whether the clause in question is capable of being severed. Another solution may be that, failing agreement, reasonable terms or prices apply and may be judicially fixed. Again it may be possible to hold that the selling State has the overriding right to determine the conditions of the sale.[3] The usual methods of interpretation may lead to the implication of a term into the treaty. Where, as will frequently happen, they do not help, the question remains: how will a solution be found?

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[1] Lauterpacht, *Second Report on the Law of Treaties*, U.N. Doc. A/CN/4/87, p. 5, and *First Report on the Law of Treaties*, U.N. Doc. A/CN/4/63, p. 25.

[2] For an example of such a duty see Lauterpacht, *First Report* (referred to in the preceding note), p. 5.

[3] Cmd. 5282: *League of Nations Treaty Series*, 172, p. 175. The provision referred to in the text is in Article 4. The treaty was later terminated: *United Nations Treaty Series*, pp. 149, 221.

[4] Most of the treaties mentioned in Section II, above, include such clauses.

[5] Mutual Defence Assistance Agreement between the United Kingdom and the United States of America of 27 January 1950, Cmd. 7894.

IV

It is this question, then, which indicates the fundamental problem of the commercial law of nations. While the commercial law of nations is known to exist, its content is unknown. Where and how is it to be discovered?

It is, of course, plain that the treaty itself constitutes the primary source of the law applicable to it; the whole of the subsequent discussion is subject to this overriding proviso. The municipal lawyer is wont to ask whether the text of a contract displaces the rule of law with which he is familiar. The international lawyer frequently, and in connexion with commercial treaties almost invariably, proceeds from the opposite standpoint. He must first exhaust every possibility of deducing the result intended by the parties from the minute scrutiny of the provisions of the treaty which is itself a source of law. In very many cases such interpretation of the treaty will render it superfluous to search for the rule of common law which in international commercial law is often merely a secondary force. In contradistinction to the contract under private law the primary source of law applicable to a commercial treaty is to a large extent the treaty itself.

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[1] Above, p. 25, note 2.

[2] Above, p. 28, note 6.

[3] The first of the solutions referred to in the text seems to prevail in France: Planiol-Ripert, *Traité de droit civil français* (2nd ed., 1956), vol. x, No. 36. It may also apply in England, though there seems to be a tendency to favour the second solution: *Foley* v. *Classique Coaches Ltd.*, [1934] 2 K.B. 1, distinguishing *May & Butcher* v. *R.*, [1929], ibid., p. 17. As to American law see Williston, *On Contracts*, s. 41. The second solution in effect also prevails in Germany by virtue of s. 316 of the Civil Code, though the determination is primarily the privilege of the creditor who, however, must act reasonably.

Yet, notwithstanding this extensive qualification, that vast *terra incognita*, the commercial law of nations, must be discovered—not for the sake of mere speculation, but on account of the undeniable necessity for resorting to and applying it where the treaty gives no or insufficient guidance or where legal rules other than those connected with a treaty are in issue. If, to repeat the example just referred to, the parties have stipulated for 'a price to be agreed separately', is the treaty, or the particular clause included in it, invalid or, alternatively, what price is payable in default of agreement? If part of the equipment sold by the United Kingdom to Denmark under the treaty of 4 March 1948[1] is defective, can Denmark claim rescission or damages or delivery of equipment of the agreed quality? If a State fails to implement its promise to make a loan, can the borrowing State claim specific performance or damages only?[2] If between the date of the treaty which imposes the duty to make a loan and the agreed date of implementation the circumstances of either party materially change, is the lending State entitled to repudiate the treaty? What are the lessor State's rights in regard to dilapidations? What are the lessor State's rights in the event of the demised premises being destroyed by fire? Does the commercial law of nations recognize agency of necessity or a claim for unjustified enrichment and, if so, what are its limits? Does the commercial law of nations recognize the existence of equitable rights or the grantor's obligation not to derogate from his grant? These are only some very few examples of questions to which the treaties themselves usually give no answer and which are typical of, though perhaps not necessarily peculiar to, the general commercial law of nations.

In one sense it is not difficult to find this law. It is included in those general principles recognized by civilized nations to which Article 38 of the Statute of the International Court refers. It cannot have any other source.

One thus turns to the practice and doctrine relating to the general principles of law recognized by civilized nations in order to see whether they give guidance to the commercial law of nations. It is perhaps not surprising that the available decisions of international tribunals have so far contributed very little to the development of the commercial law of nations: it is a body of law which is in its infancy and which as yet has hardly come up for consideration by an international tribunal. Those decisions which have a bearing on the commercial law of nations, as opposed to international law in general, and which are discussed in the third part of Sir Hersch Lauterpacht's book on *Private Law Sources and Analogies of International Law* conclusively prove the controlling force of the principles of private law. But none of these cases of which, in the present context, the *Russian Indemnity* case is of particular interest, throws much light on the methodological problem of how the law is to be found. On many occasions the existence of a general principle relating to the assessment of damages, waiver, *force majeure* and other matters has been asserted by international tribunals. In many instances it would not be difficult to show that the principle so asserted is perhaps not quite as general and unequivocal in private law as the tribunal seemed to think. The remarkable fact remains that international tribunals have on many occasions failed to elucidate the route which led them to their assertions. They have thus not only made it difficult to check the correctness of the results, but may also have deprived their decisions of much of the value which attaches to a precedent that is based on exhaustive documentation and a detailed explanation of the process of reasoning. Any tendency to state general principles in general term should, therefore, be avoided. While it is sufficient to teach us where we are to dig to find the source, it does not tell us which tools we should use and how we are to handle them.

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[1] Above, p. 23, note 2.

[2] Above, p. 30, note 4.

That, on this problem of method, the vast literature on the general principles within the meaning of Article 38 proves to be largely unhelpful is a matter for real disappointment. This literature in the first place has seen its task in the enumeration of the general principles which in the past have been accepted or alluded to by international tribunals.[1] Such catalogues tell us that restitutio in integrum, estoppel, waiver, the prohibition of an abuse of rights, *res judicata* and many similar institutions or conceptions of private law have been recognized as general principles of law. There are, secondly, writers[2] who attempt to extract from available decisions broad maxims which are said to be general principles, but which constitute merely a re-formulated catalogue. Thus reference is made to the principle of responsibility, of self-preservation, of good faith. Thirdly, doctrinal discussion seems to be interested in a somewhat speculative and frequently verbal analysis of Article 38. One reads about the nature of the general principles and their connexion with natural law,[3] about general principles as a source of international law and about the question whether they are an independent source.[4] It is not intended to deny the usefulness of these contributions. But it is intended to submit that many of the earlier discussions[1] have failed to pay sufficient attention to the overriding problem of ascertaining how general principles are to be discovered. This is a purely practical problem of *method*. Its solution provides an answer to the question how the commercial law of nations can be found.

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[1] See, for example, Rousseau, *Principes généraux du droit international public* (Paris, 1944), vol. i, pp. 901 et seq.

[2] See Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London, 1953).

[3] Rousseau, op. cit., p. 892 with further references.

[4] Rousseau, op. cit., p. 894 with further references.

It is believed that some slight progress can be made if the following submissions are accepted:

1. The general principles as a whole and the commercial law of nations in particular are determined and defined by comparative law, i.e. by the process of comparing municipal systems of law. Although publicists rarely refer in terms to comparative law as a 'source'[2] of international law, the great majority is likely to agree. This is so for the obvious reason that since the elimination of the direct influence of Roman law there does not exist any system or branch of law, other than comparative law, which could develop general principles.[3] Moreover, the positivist will derive support for the conclusion from a remark made by Lord Phillimore in the course of the deliberations of the Committee of Jurists of 1920. He explained[4] that the general principles were those principles which applied in *foro domestico*. He thus referred expressly to comparative law as their source. So did, for instance, Ripert[5] when he reached the conclusion 'que c'est dans les législations positives qu'il faut chercher les principes généraux du droit'.

2. The fact that a rule is of a technical character does not mean that it does not, or cannot, constitute a general principle. To put the same point differently, it is the generality of the application of the rule, not the generality of the legal idea underlying it, that determines whether or no it is a general principle. Very little, if anything, is therefore to be gained by drawing a distinction between principles and rules, a distinction which is largely verbal, which has never been satisfactorily defined and should be discarded.

This view is opposed to the prevailing trend of opinion. Thus Ripert,[6] whose outstanding contribution should be acknowledged, starts from the premiss that 'les principes du droit sont les règles essentielles sur lesquelles sont greffées des règles secondaires d'application et de technique'. He elaborates it in words which merit quotation in full:[7]

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[1] The greater part of the vast literature has been consulted, but only a small part of it is being referred to in these notes. For the reasons which have been given in the text many earlier contributions do not throw light on the present problems, so that the selection of characteristic views is likely to suffice. Tribute must, however, be paid to Sir Hersch Lauterpacht's important and, indeed, fundamental works on the subject, without which this article could not have been written: *Private Law Sources and Analogies of International Law* (1927), and *The Function of Law in the International Community* (1933).

[2] Although comparative law is, of course, only a method of study, it does not seem to be unjustifiable to describe some of the results achieved by the comparative method as a source of law.

[3] It should be obvious that natural law in the traditional sense cannot help. The 'modern law of nature' referred to by Lord Asquith (above, p. 22, note 4) is, of course, something different.

[4] *Procès-Verbaux of the Proceedings of the Committee* (1920), p. 335.

[5] *Recueil des Cours*, 44 (1933), pp. 569 et seq., at p. 579.

[6] Ibid., p. 575.

[7] Ibid., p. 582.

> 'Pour définir les principes généraux du droit interne des nations civilisées, il n'est pas nécessaire d'envisager toutes les règles positives adoptées par ces nations. Le principe commande les règles; on peut changer une règle sans renverser un principe, mais si on change un principe il faut modifier une série de règles. Les règles sont établies sur des considérations d'ordre pratique et d'après une certaine technique. Elles ont presque toujours un caractère national, parce que les besoins ne sont pas partout identiquement les mêmes et que la technique dépend, jusqu'à un certain point, de l'esprit national. Les principes, au contraire, se retrouvent semblables dans les principales législations. Il y a accord sur les principes, bien que diversité dans les règles. Les nations civilisées ont, à l'heure actuelle, un droit qui est établi sur des principes communs, bien que leur droit codifié ait un caractère technique particulier.'

To mention another writer of authority with a different background, Verdross[1] propounds a similar theory:

> 'On doit ainsi distinguer nettement la technique du droit interne et les principes généraux qui se trouvent à sa base. Il ne suffit donc point de rechercher les règles formulées par la science du droit comparé pour les appliquer aux relations internationales, il est nécessaire de pénétrer jusqu'aux principes généraux supposés par le droit positif.'

There are many reasons which enjoin the rejection of these suggestions. Firstly, the wording of Article 38 does not by any means necessitate their adoption. A generally accepted rule may well be described as a general principle. A denial of this proposition would demand so narrow and verbal an interpretation as to make the argument an inadmissible play with words. Secondly, such international practice as is material to the point does not support the suggested distinction. Thus in the Award which the Senate of the City of Hamburg made in 1861 in an arbitration between Great Britain and Portugal[2] the amount of interest to which the claimant Government was entitled was held to be limited to the amount of the capital. This decision was based on the rule of *alterum tantum* developed by Roman law. The rule which has not at any time formed part of the common law and has not found its way into the modern codifications of continental countries is of a technical character. It does not appear to be derived from any basic principle of law. Yet it was applied in 1861 and, if it still existed, could be applied today.[3] Thirdly, it must be doubted whether it is always possible to find a 'principle' which underlies each technical rule. Fourthly, it is probably wrong to think that principles 'se retrouvent semblables dans les principales législations' and that, therefore, the problem is solved in practice if one penetrates to the principles as opposed to the rules. Fifthly, however, the distinction between principles and rules ignores the requirements and perhaps even the existence of the commercial law of nations. It is of the very essence of commercial law that it is frequently concerned with technicalities of the law. The commercial law of nations would be poorly served and could, indeed, not be developed at all if it could not be build upon generally recognized rules of a technical character, but had to rely on 'principles' or maxims which are necessarily vague, colourless and ambiguous. In particular, the principle of good faith which unquestionably pervades public international law should not be regarded as a sufficient substitute for a more detailed commercial law of nations. The opposite view would, it is believed, be mistaken because it ignores the teachings of private law. In a sense it is quite true that all law and all legal systems incorporate and are based upon some such maxims as find expression in the maxims of English equity, in Article 1134 of the French or in s. 242 of the German Civil Code or in similar provisions of codified law. Many, if not most, of the specific rules and provisions accepted in the systems of municipal law can be said to be manifestations or applications of such maxims. Yet 'general clauses', as they have been called, have been proved to be an unsatisfactory guide and dangerous to legal development. While no legal system has found it possible to do without them none has found it possible to work with them alone. They leave much room for a subjective approach by the court. They leave the result unpredictable. They lack that minimum degree of precision without which every legal decision would be wholly uncertain. They may, on occasions, be useful to fill a gap but in essence they are too elementary, too obvious and even too platitudinous to permit detached evaluation of conflicting interests, the specifically legal appreciation of the implications of a given situation. In short they are frequently apt to let discretion prevail over justice. For these reasons they cannot be the sole source of a sound and workable commercial law of nations.

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[1] *Recueil des Cours*, 52 (1935), pp. 195 et seq., at p. 205.

[2] Lapradelle-Politis, *Recueil des arbitrages internationaux*, vol. ii, pp. 72 et seq., at p. 108. For criticism see ibid., p. 108.

[3] The Award should not, on this point, be treated as a precedent, because the alleged principle does not now exist.

It is, of course, not intended to suggest that rules should invariably be preferred to 'principles' or that 'principles' should be ignored. The argument is directed against overrating the legal strength of principles and against the exclusion of technical rules from the ambit of Article 38—a provision which, if it is to fulfil its purpose, requires the most elastic and liberal interpretation and application.

3. A principle of law is a general one if it is being applied by the most representative systems of municipal law.

That universality of application is not a prerequisite of a general principle of law is emphasized by almost all authors.[1] It should be equally clear that a single system of municipal law cannot provide a general principle within the meaning of Article 38. What is usually required is that the principle pervades the municipal law of nations in general.[1] It is believed, however, that a more specific formula ought to be found.

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[1] Ripert, op. cit., p. 579; Verdross, op. cit., p. 205, and many other writers.

Where a rule of customary international law or a treaty between States having heterogeneous legal systems is in issue a wide field of application is normally both necessary and sufficient to establish a general principle. The numerical aspect is likely to be of little consequence. Rather is it the weight, the quality, status, prestige of the principle or rule that matters. Regard should be had to those imponderables which are enshrined in the reference to the representative character of a municipal system of law. A long line of decisions, possibly rendered by the highest tribunals over a long period, may carry greater authority than a longer line of statutes or decrees. Historical developments will frequently provide guidance.

The process of comparison should be different where the issue arises from a treaty between States having related legal systems. In this case a principle common to the law of the countries in question may be treated as a general one and may even prevail over a different principle accepted by all or most other countries of the world.[2] Let it be supposed that a treaty provides for the sale of equipment by one State to another 'at a price to be agreed separately' and that according to the municipal law of both parties in default of agreement the seller determines the price. Let it be supposed, further, that in such circumstances most systems of municipal law provide for the payment of a reasonable price. Would it not be more satisfactory and in closer harmony with the intention of the parties to let the law of the parties prevail over what in another case may have to be treated as a general principle of law? A common denominator may and sometimes should outweigh an alien, albeit general denominator. It indicates, in the given conditions, the more representative legal systems.

4. A principle of law is a general one even though the constituent rules of the representative systems of law are similar rather than identical.

Comparative lawyers will regard it as almost platitudinous that complete identity, extending to all the details of a legal rule, hardly ever exists between the legal systems of two or more countries; even if the wording of a statutory provision is the same, its judicial interpretation may differ from country to country. On the other hand comparative lawyers will not hesitate to testify to the existence of a surprising degree of similarity of rules or at least results, arrived at frequently by differing means, processes of reasoning or classification. It is this similarity which permits the deduction of general principles. Perhaps it will be thought that the facts do not warrant so optimistic and even sweeping an assessment of the help which comparative law can render. By the very nature of things only impressions or beliefs can be formed. No doubt they will not be shared by all, but they are likely to be supported by most of those who have the benefit of practical experience.

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[1] Article 38 speaks of principles recognized 'by civilised nations', not 'by the civilised nations'.

[2] A similar view has been expressed by a comparative lawyer, René David, in his *Traité élémentaire de droit civil comparé* (Paris, 1950), p. 101.

It is, of course, likely that even the most comprehensive investigation does not always produce an unequivocal solution in that, for instance, several groups of legal systems may emerge which differ in respect of the rule in question from each other and each of which may claim to have representative character. In such a case the international judge, unless he feels compelled to reach the desperate and wholly unsatisfactory verdict of *non liquet*, will have to make a choice in the spirit of the legislator. By his decision he will create a general principle and thus exercise a function which in all countries of the world a judge, though he purports to apply the law, in fact frequently performs.[1] No text confers such power upon an international judge who is not expressly authorized to decide *ex aequo et bono*. Yet that power is inherent in the judicial process in general and should be affirmed, because without it neither international law as a whole nor international commercial law could live and develop.

In short, the commercial law of nations should be approached in a manner corresponding to the attitude which, before the nineteenth century, English jurists adopted towards the law merchant. Sir John Davies in 1656[2] and many later writers, including Malynes, Molloy and Blackstone, envisaged the law merchant as 'a branch of the law of nations'[3] and judges described it as 'jus gentium',[4] as 'a system of equity, founded on the rules of equity and governed in all its parts by plain justice and good faith'.[5] This meant no more than that the law merchant 'was free from certain technical rules of the common law'.[6] The terminology should not be misunderstood: the earlier English jurists did not intend to attribute to the law merchant the quality of public international law in the modern sense. Rather were they thinking of a universal law, of usages which, notwithstanding local variations, were common to the Western world.[7] Today so cosmopolitan an outlook has disappeared in municipal law. It should be revived for the purpose of moulding the commercial law of nations. International lawyers will succeed in discharging their task if they follow the example of their forebears who discovered and developed the law merchant.

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[1] This is clearly seen by Lauterpacht, *The Function of Law in the International Community*, p. 60 et seq.

[2] *Concerning Impositions*, p. 17 [quoted from Sir John Macdonell in Smith, *Mercantile Law* (13th ed., 1931, by Gutteridge), Introduction, p. ccviii].

[3] Smith, op. cit.

[4] *Mogadara* v. *Holt* (1691), 1 Shower 318.

[5] *Master* v. *Miller* (1791), 4 T.R. 340, per Buller J.

[6] Smith, op. cit.

[7] See Sir Frederick Pollock's valuable Introduction to the 'Commercial Law of Great Britain and Ireland', being vol. i of the *Commercial Laws of the World* (ed. by Bowstead), p. 11.

V

It was originally intended at this point to discuss a hypothetical case founded upon one of the treaties referred to in Section II and affording a suitable illustration of the method of approach which is suggested by the preceding observations. It is, however, possible now to adopt the more satisfactory course of taking an actual case as an example and submitting its methodological basis and reasoning to scrutiny. This is the case of the *Diverted Cargoes*, which led to an arbitration between Greece and the United Kingdom and to an Award made in 1955 by the sole Arbitrator, Monsieur René Cassin, Vice-President of the Conseil d'État in Paris.[1]

The facts may in a considerably simplified form be summarized as follows. In April 1941 ships bound for Greece were diverted by British forces to territories outside Greece, where their cargoes, the property of the Greek consignees, were discharged and taken over by the British authorities for use in the war against the common enemy. In February 1942 the Governments of Greece and the United Kingdom entered into a treaty[2] the short effect of which, in so far as it is relevant for present purposes, was that the Greek Government undertook to prevent the owners of the cargoes from making any claim against the British Government, and the latter Government undertook to credit the Greek Government with 'the f.o.b. cost of such cargoes'. Some of them had been bought in the United States of America against dollars. Before September 1949, when sterling was devalued, the two Governments had agreed that in respect of goods bought against sterling the Greek Government was entitled to a credit of £1,438,600 and that the f.o.b. value of goods bought against dollars was $4,051,401, which, on the basis of 'une conversion comptable', was agreed to be equal to £1,012,850. Furthermore, in August 1949 the Greek Government agreed to credit the British Government with a sum of £1,666,700[3] and in March 1950 agreed to discontinue a claim to a sum of

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[1] The Award, written in the French language, is published in *Revue critique de droit international privé* (1956), p. 278, with a Note by Batiffol. The quotations in the text are taken from an English translation prepared in the Foreign Office, but not yet published. A valuable Note on the case by Mr. J. L. Simpson appeared in the *International and Comparative Law Quarterly*, 5 (1956), p. 427. For a critical but very helpful comment upon some of the questions of monetary law arising from the Award see Dach, *American Journal of Comparative Law*, 5 (1956), p. 512.

[2] It is printed in Cmd. 9754.

[3] It thus appears that, had an account been taken in August 1949, the Greek Government was entitled to £1,438,000 plus £1,012,850 less £1,666,700, i.e. £784,150 only. Or to put the point in a different way, in August 1949 more than the sterling equivalent of $4,051,401 was wiped out by the amount of £1,666,700 due from Greece, and even if the latter sum was credited against the sum of £1,438,000 about £228,700 was available to reduce at that time the dollar amount by almost $1,000,000. Yet the Award ordering payment at the rate of $2.80 to the £ seems to apply to the whole of the sum of $4,051,401, and this is in the face of the fact that according to the Arbitrator conversion had to be effected 'on the day on which the credit due to the Hellenic State is given' ('au jour où aura lieu l'inscription du crédit dû à l'État hellénique'). See below, p. 43, note 1.

$3,999,235.48. On the other hand, in August 1951 the British Government admitted the f.o.b. value of certain goods bought in the United States at $2,057,698.94. The issue before the Arbitrator was whether the f.o.b. cost of goods purchased in the United States was to be converted into sterling at the post-devaluation rate of $2.80 to the pound (as the Greek Government contended) or at the pre-devaluation rate of $4.03 to £1 (as the British Government contended). It is to be noted that the parties had expressly agreed by their Terms of Reference[1] that actual payment was to be made in sterling and that, accordingly, sterling was the money of payment.

In order to decide that issue the Arbitrator asked himself three questions.

The first was: What was the currency—dollar or sterling—which the parties chose in 1942 as the *monnaie de contrat* for the effective settlement of the claim? The Arbitrator had no difficulty in concluding that the Agreement created a single account in a single currency, viz. sterling. Hence the dollar was not adopted as the 'monnaie de contrat, c'est-à-dire de paiement effectif'.[2]

The second question was whether the sterling credit thus to be given was to be calculated by reference to the dollar regarded as the unit of value and as the money of account ('comme étalon de valeur et comme monnaie de compte'). It is difficult to understand how this question could ever arise or how, as the Arbitrator records, the British Government could ever contend for a negative answer. If the f.o.b. value of goods bought in the United States against dollars is to be ascertained, one necessarily starts from the dollar as the money of account. The obligation of the British Government can only have been for '*x* dollars payable in sterling' or for 'such sum of sterling as corresponds to *x* dollars'. In either case the result was probably the same,[3] but having rejected the former alternative by his answer to the first question, the Arbitrator was bound to answer the second by holding that the dollar was the money of account.

He thus reached his third and last question which, it is believed, was the only one of substance that arose in the case: Which rate of exchange—the rate on the day on which the debt arose or the rate of the day of payment or settlement—should be used to calculate the sterling amount to be credited to Greece? The Arbitrator held that the rate of exchange of the date of settlement[1] had to be applied. After some introductory remarks the Arbitrator stated:

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[1] Cmd. 9754, Terms of Reference, clause 5 (A): 'the Royal Hellenic Government accepts that the credit to be given even for the aforesaid cargoes will be in sterling'.

[2] It is submitted with respect that the Arbitrator's terminology is confusing. He seems to draw a distinction between *monnaie de contrat* and *monnaie de compte*. No such distinction exists. Moreover, the phrase referred to in the text and numerous similar phrases which occur in the Award make it clear that to the Arbitrator's mind *monnaie de contrat* and *monnaie de paiement effectif* are interchangeable conceptions. In truth the dollar may be the *monnaie de contrat* or the *monnaie de compte*, yet sterling may be and, as a result of the Terms of Reference, clearly was the *monnaie de paiement effectif*. On the distinction see Mann, *The Legal Aspect of Money* (2nd ed., 1953), p. 158.

[3] In both cases the same problem of construction would arise.

> 'The international practice in legislation, agreements and cases as well as the practice of the great majority of nations recognises that the rate of conversion from the money of account into the money of payment is that prevailing at the date on which the debt is settled.'

He then referred to Article 41 (in fact he wrote '49')[2] of the Geneva Uniform Law in Bills of Exchange which, he said, provided 'one of the most striking instances of the great importance attached to the rate of conversion at the date of the payment of the debt'. He proceeded to discuss at some length the decisions of the Permanent Court of International Justice in the cases of the *Serbian and the Brazilian Loans*[3] and concluded his investigation of the law by stating:

> 'After reference to so decisive a monument of international case law it is unnecessary to add either the long list of decisions of courts of many countries in support of the principle of conversion on the day of actual payment (see for example the reasons given in support of this thesis by Nussbaum, op. cit., p. 361) nor an analysis of the cases of the common law countries which, starting from a different conception, that of conversion on the day of the breach of the contract, frequently arrive in practice at conclusions very similar to those of other systems of law (see criticism by Nussbaum, op. cit., p. 370).'

Finally, the Arbitrator turned to the Agreement before him and set forth the specific reasons 'which combine to require the application to the present dispute of the principle of conversion on the day of actual payment'.[4]

The preceding summary is, it is hoped, sufficient to lay the foundation for a discussion of the three general questions to which the Award gives rise within the context of this article: What was the source of law to which the Arbitrator resorted? How did he proceed to ascertain the law? Does the law which he thus purported to apply in fact have the effect assumed by him?

(1) As to the source of the law applicable by him the Arbitrator made

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[1] This expression, used in the English translation, means the date of payment. It is, however, noteworthy that in the fifth paragraph of his concluding summary the Arbitrator equiparates the date of payment to the 'day on which the credit due to the Hellenic State is given' (see above, p. 41, note 3). These two dates do not necessarily coincide and did not coincide in the present case.

[2] This error is not without interest. It also occurs in Nussbaum, *Money in the Law, National and International Law* (2nd ed., 1950), p. 361, one of the few books referred to by M. Cassin (see below, p. 44, note 1), although Nussbaum prints the full text in note 5.

[3] *Collection of Judgments* (1928–30), Series A, Nos. 14, 15.

[4] These reasons are unconvincing. The first was that by virtue of the undertaking to credit Greece 'with the f.o.b. cost of the cargoes' the British Government's obligation 'must necessarily be ascertained by a conversion on the very day on which the credit is actually given'. This statement merely begs the question. The second reason rests on the 'non-profit making and strictly compensatory character' of the treaty. It involves not only a *non sequitur*, but is also, at least in part, derived from the unfounded belief that Greece was entitled to a credit only 'on condition that the Royal Hellenic Government themselves repaid the owners of the cargoes requisitioned'. The treaty contains no such express or implied condition.

only two pronouncements. On the one hand he thought that his decision had to rest 'upon the basis of respect for law' in accordance with Article 37 of the first Hague Convention of 1907. On the other hand, he started from the undeniable premiss that the Agreement of 1942 was 'unquestionably governed by international law'. Yet it is clear that he found the law applicable to the case before him, in so far as it was not merely the construction of the treaty that was in issue, in the municipal practice of the family of nations, however 'technical' in character it may have been. It is true that the Arbitrator did not in every respect accept the controlling character of the analogy of the institutions or rules of municipal law; thus he did not think it right to have recourse 'to the alleged existence of a huge current account between the two Governments which is a conception of municipal law'. Nevertheless, taken as a whole, the Award rests on reasoning which is exclusively derived from municipal law and which, indeed, could not possibly be derived from any other source. The broad distinction, fundamental to the Award, between the money of account and the money of payment has hitherto been unknown to public international law *stricto sensu*. The rule that conversion is to be effected according to the rate of the date of payment, almost in terms proclaimed by the Arbitrator as a generally accepted principle of law and thus given the status of a rule of international law, is derived from no source other than municipal law. This method of approach may have been self-evident, simply because nowhere else could guidance possibly be found. But it merits express and unqualified welcome and approval, particularly in view of the fact that the issue related, not to one of those broad and, perhaps, primitive general principles which underlie municipal law, but to 'lawyers' law', to very specific aspects of a specific branch of municipal law.

(2) The Arbitrator's method of deriving general principles of law from municipal law is perhaps less exemplary and should not without hesitation be accepted as a precedent.

In the first place it is remarkable that in connexion with a point of law arising between Greece and the United Kingdom no reference was made by the Arbitrator to Greek or to English law. No Greek or English statutory provision, decision or academic authority on private law is mentioned in the Award. Nor were American sources consulted, though references to American writers occur.[1] On the other hand, in a case which had nothing to do with France reliance was to a considerable extent placed upon French law. A thesis submitted to the University of Paris[2] or a Note on certain French decisions published in a French legal periodical are put on the same level as leading French textbooks[1] and both sources are preferred to French decisions which are ignored altogether, though by no means all of them give unqualified support to the statements made by the writers consulted by the Arbitrator. Moreover, no comparative material available in other countries was resorted to. Even the full significance of the Geneva Convention on Bills of Exchange was not emphasized: no mention is made of the fact that it applies in seventeen countries.

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[1] They were Nussbaum, op. cit., and Domke, 'International Loans and the Conflict of Laws', *Transactions of the Grotius Society*, 1 (1937), (which really deals with the gold clause).

[2] Penciulesco, *La Monnaie de paiement dans les contrats internationaux* (Thèse, Paris, 1937).

It is submitted that such treatment of comparative law as a source of international law is insufficient to establish the existence of principles of general application and to secure the necessary respect and authority for international decisions which are based on municipal law. Where a bilateral treaty is involved the law of the contracting States should not be ignored. The law of a third State, not concerned with the treaty, can only serve as an example, not as the sole source of international law. Intensive research and, in particular, close investigation of judicial practice is required if comparative law is to serve as a satisfactory yardstick to international law. In the discharge of this task the parties and their representatives will have to take a considerable share. In fairness to Monsieur Cassin it must be added that the pleadings in the present case have not been published and that it is, therefore, impossible to say to what extent he received all the assistance which he could expect.

(3) Although the broad results reached by the Arbitrator may have been correct, the statements made by him on the effects of municipal law are open to criticism. In view of the methods employed for the purpose of finding the municipal law this is perhaps not surprising. Five points require consideration.

The conflict between conversion at the rate of exchange prevailing at the date of maturity (maturity-date rule) and conversion at the rate of exchange prevailing at the date of payment (payment-date rule) has developed over the centuries in connexion with a specific situation: in the words of the Geneva Convention on Bills of Exchange[2] it arises when an obligation 'is expressed to be payable in any currency other than that of the place of payment'. Thus, if dollars are payable in London, it is probably both the law of England and a general principle of law that the debtor has the option of paying in sterling.[3] Where such occasion for conversion occurs, it becomes necessary to choose between the maturity-date rule and the payment-date rule. In the case of the *Diverted Cargoes* this particular occasion for conversion did not arise, for by his answer to his first question the Arbitrator held that the United Kingdom had not undertaken to pay dollars, but had undertaken to pay such sum of sterling as corresponded to a certain sum of dollars. Even on this footing, of course, it became necessary to choose the date determining the rate of exchange. But the question was one of construction and the vast body of law developed in regard to the case in which a sum of money is payable in a currency different from that of the place of payment could, at the most, be material by way of analogy. The point is by no means of merely formal significance, for in answering his third question, the essential question in the case, the Arbitrator was so clearly influenced by what he regarded as the governing general principle of law that it is impossible to say what his conclusions would have been if he had realized that that principle was not directly applicable.

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[1] The Note (which is by no means the most illuminating contribution to monetary law which the French legal world has produced) is by Loussouarn, *Revue critique du droit international privé* (1953), p. 389. The textbooks are Planiol–Ripert, *Traité pratique de droit civil*; Ripert–Boulanger, *Manuel de droit civil*; and Batiffol, *Traité élémentaire de droit international privé*. The last-mentioned work (2nd ed., 1955), pp. 675 et seq., does not deal with the particular problems which confronted the Arbitrator.

[2] Similar words occur in the Geneva Convention on Cheques.

[3] See Mann, op. cit., pp. 272–85. See also the survey by Dach, 'Conversion of Foreign Money', *American Journal of Comparative Law* (1954), p. 155.

Even assuming, however, that the body of law to which the Arbitrator referred was, directly or indirectly, applicable, it is by no means certain that the payment-date rule can be said to be supported by 'so decisive a monument of international case law'. As will be shown below, the Geneva Convention on Bills of Exchange confirms it only to a limited extent. The decisions of the Permanent Court of International Justice in the cases of the *Serbian Loans* and the *Brazilian Loans*[1] relate to the gold clause and are not germane to the issue.[2] The payment-date rule seems to exist only in Greece, Austria, Germany and South Africa.[3] There are many countries in which, at any rate outside the law of bills of exchange, the maturity-date rule prevails[4]—in Italy this rule was reaffirmed as recently as 1942 when the new Civil Code was introduced. There are also countries which regard the problem as one of construction. This solution which, it is believed, demanded application in the present case for more than one reason, has possibly been adopted in England,[5] and is very likely to prevail in France where, consequently, the practice of the courts does not by any means establish the uniform control of the payment-date rule.[6] It must suffice to refer to one decision of the Cour de Cassation[7] where it is said

> 'qu'il est de principe, en effet, que tout paiement fait en France, quelle qu'en soit la cause, doit être effectué en monnaie française et *que le solde d'un marché fixé en dollars doit être évalué selon le cours du dollar au jour où le débiteur devait payer*'.

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[1] Above, p. 43, note 3.

[2] The reference to the decisions mentioned in the text indicates an almost incomprehensible *lapsus* on the part of the Arbitrator. There is, however, a widespread tendency in French literature to rely on them in support of propositions with which they are not concerned: see, for example, Batiffol, op. cit.

[3] Mann, op. cit., p. 278 note 1.

[4] Mann, op. cit., p. 278 note 2 where, however, the reference to Italy is wrong.

[5] Mann, op. cit., p. 285.

[6] Mann, op. cit., pp. 278–80.

[7] Req. 17 February 1937, *Clunet* (1937), p. 766.

and to quote from the relevant section, ignored by the Arbitrator, of Planiol-Ripert's authoritative work[1] where French practice is summarized: 'La Cour de Cassation estimait que la date dépend encore de la volonté implicite des parties.' The niceties of French law on the point cannot and need not be pursued here: all that matters for present purposes is to note 'les contradictions apparentes'[2] of French practice.

Next, in support of the general character of the payment-date rule the Arbitrator relied on the Geneva Convention on Bills of Exchange which, he thought, provided 'one of the most striking instances'. In truth, that Convention provides that 'the sum due may be paid in the currency of the country at the rate of exchange on the day of maturity', but 'if the debtor is in default', the creditor may require payment at the rate on the day of payment. However, the Award does not hold that there was any default on the part of the British Government.[3] The Geneva Convention, therefore, did not assist the Arbitrator.

Again, as has been shown, the payment-date rule has been developed in contradistinction to the maturity-date rule. But on the facts of the case of the *Diverted Cargoes* it is not even clear, and the Arbitrator did not decide, when the United Kingdom's debt fell due. This again shows that the body of municipal law on which the Arbitrator relied was not relevant. Moreover, the British Government, as the Award records, had argued in favour of the rate of the day on which the debt arose. This probably meant 1941 or 1942. The true issue raised by the British Government was, it seems, that the Treaty of 1942 by implication included a provision to the effect that conversion was to take place on the basis of the rate of exchange of 1942, or a clause such as '$4.03 = £1'.[4] If this is right, the issue, treated as one of construction, is hardly reflected in the Award.

Finally, it is necessary to mention a point which may have influenced the Arbitrator, to which he merely alludes, but which, notwithstanding its immense significance, he does not develop. It is expressed in one sentence:

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[1] *Traité de droit civil français* (2nd ed., 1954), vol. vii, No. 1161. The sentence quoted in the text is followed by the remark that ordinarily resort is had to the rate prevailing on the day of maturity.

[2] Mater, *La Monnaie* (1925), p. 270.

[3] On the other hand the Arbitrator held expressly that there was no evidence of the delay in the negotiations being due to the fault of the creditor.

[4] The British Government's case was, therefore, the same as that of the defendant in whose favour the Cour de Paris rendered the decision of 22 December 1951, *Revue critique de droit international privé* (1953), p. 379; it is one of the decisions commented upon by Loussouarn (above, p. 45, note 1) upon whom the learned Arbitrator relied. The defendant, acting for a party of travellers, had hired from the plaintiffs, a Swedish company, through their Paris agency a coach for travelling from Stockholm to Paris. The agreed price was expressed in Swedish currency. But the defendant submitted that in the circumstances the equivalent in French francs, calculated at the rate prevailing at the date of the contract, was the real *monnaie de contrat*, the money of account. This submission was upheld. In the case before Monsieur Cassin the dollar amount was, of course, at the date of the contract unknown. It may well be that if in accordance with the teachings of comparative law he had attached weight to the decision of the Cour de Paris rather than Loussouarn's comment on it he would have found it easier to appreciate the real nature of the British case.

> 'The creditor is entitled to reject, in so far as it would affect the substance of his claim, the effect of any action taken by the debtor State itself to devalue its currency.'

If this sentence is intended to lay down the theory that in inter-State relations the debtor State cannot rely on the effects of nominalism flowing from its own monetary legislation, then great regret would have to be expressed at the appearance of a truly fundamental rule which, for reasons developed elsewhere,[1] cannot be accepted as sound, and at the absence of any reasoning designed to support it.

There thus exists considerable doubt whether the learned Arbitrator applied municipal law correctly. Private law, while it must be the principal source of the commercial law of nations, cannot be a safe source except by the employment of the utmost care and precision. It would be unfortunate if the commercial law of nations came to be built upon a foundation of false analogies of private law.

VI

The commercial law of nations thus constitutes a challenge to the international and the comparative lawyer alike. It is only by their co-operation that it can be developed into a workable system of law.

The international lawyer must become familiar with the functions and methods of a branch of the law of which, usually, he has little experience. He is bound to run considerable risks if he should believe that the art of comparing can be practised without training and education. This applies not only to the international judge, but also to the advocate appearing before an international tribunal and, in particular, to the draftsman of international documents.

The task of supplying the material with which large parts of the commercial law of nations will be built is primarily, however, imposed upon the comparative lawyer. For him the commercial law of nations opens a field which has hardly been explored, but has, perhaps, the strongest claim to his attention. Very few comparative lawyers have shown themselves aware of the nature and extent of the contribution which they are called upon to make.[2] There is room for the impression that even the late Professor Gutteridge who devoted a remarkable essay[3] to the relationship between comparative law and the law of nations did not fully appreciate the specific requirements of the commercial law of nations. He felt that general principles of private law which are recognized by civilized nations 'must be rare, partly because there is little or no scope for the employment of any save the main principles of law for this purpose, and partly because such exploration of the field as has been attempted appears to indicate that there are few principles of this description'.[1] This conclusion was due to the fact that the learned author was thinking mainly of international law in general rather than its several branches and did not contemplate the particular branch with which this article is concerned. This is made clear by his discussion of the principle of impossibility of performance. He felt[2] 'grave doubt' whether it was possible to discover in the English doctrine of frustration, in the French theory of imprévision, and in the German principle of good faith 'some underlying principle which is common to all these attempts to solve the problem, and whether such principle, if it exists, could be adapted to the settlement of international disputes'. He continued, significantly, as follows:[2]

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[1] Mann, op. cit., pp. 451, 452.

[2] This also applies to Rabel, 'Rechtsvergleichung und internationale Rechtsprechung', *RabelsZ*, 1 (1927), pp. 5, 17–19, but does not apply to David referred to above, p. 39, note 2.

[3] *Comparative Law* (2nd ed., 1949), pp. 60–71.

> 'It is, of course, obvious that the environment in which such a principle would be required to function is not the same in the international as in the private sphere. This is so . . . because the problem as it arises in private law has an economic background which is very different from the political considerations which surround it in international law.'

It is possible that this view is too narrow. It cannot be shared by anyone who realizes the 'economic background' on which the commercial law of nations rests. Professor Gutteridge continued to express the opinion that in any event there was not 'much hope of the discovery of a principle [relating to impossibility of performance] which is recognized by all systems or even by a majority of them'.[2] Here again a broader approach would seem to be desirable. In the first place, as has been indicated above, international law does not confine the usefulness of municipal law to the case in which comparative lawyers can prove the existence of a rule in identical form in all or most systems: existence of the rule in the most representative systems is sufficient to render municipal law a source of international law. Secondly, however, it is at the present stage of the development not really a question of formulating a common 'principle'. It is tempting to suggest that the search for the formulation of a 'principle' is both confusing and irrelevant. Rather is it necessary to consider the particular point or problem or issue and to ascertain how this point, this problem, this issue is in fact solved by the law of the most representative countries. It must be stressed again that a detailed investigation of practice and doctrine is likely often to disclose a widespread identity or, at least, similarity of result in a given case, though the starting point, that is to say, the legal rule or 'principle' may vary considerably in formulation as well as in character. What the commercial law of nations is concerned with is the result rather than its origin or derivation. In a given case the first system may work with the conception of the implication of terms, the second may have an express statutory provision, the third may rely on the requirements of good faith, the fourth may refer to judicial discretion—these are merely relatively unimportant questions of method. What matters is whether they lead to the same or to similar results.

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[1] Ibid., pp. 65, 66.

[2] Ibid., p. 67.

From this point of view, then, the most effective assistance which the comparative lawyer can render in the development of the commercial law of nations can be defined with a fair degree of precision. It is true that, as Professor Gutteridge concluded,[1] comparative law furnishes the international lawyer 'with an objective by which he can measure the justice of a principle' and also with 'a corrective to any tendency . . . to employ concepts or rules which either belong exclusively to a single system or are only to be found in a few of such systems'. Yet comparative law has also a much more important, a much more direct function: it provides, or at least it ought to provide, the international lawyer with a pattern which will guide him to the solution of his practical problems and which will protect him against the many dangers and pitfalls involved in any process of comparison. It is, of course, impossible to compile a treatise or digest which would describe in a comparative fashion everything that could conceivably be of interest to the commercial law of nations. But it is feasible and, indeed, imperative to select isolated subjects and to show how far they have received solutions which may be described as common to the representative systems of law and, therefore, as expressive of a general principle. International law supplies an abundance of typical questions which lend themselves to comparative research on these lines. It may well be that the international lawyer will never be confronted with an actual case upon which such specific studies would have a bearing. But if he is conversant with them, then he will have a better idea of how he should proceed when he is faced with a problem requiring a similar type of investigation. It is for comparative law to evolve the methods of research and to define the standards of identity, affinity or similarity which are adapted to the peculiar requirements of the commercial law of nations and will in the future mould it into a coherent branch of the law. International law is designed to have the benefit of this work, but ought not to be called upon to do it. In many respects the commercial law of nations, therefore, may have to be developed primarily by the comparative lawyer who is aware of its existence and needs and who, since the days of Saleilles and Lambert[1] has become familiar with the task of ascertaining 'the principles which are common to all civilised systems of law', rather than by the international lawyer whose equipment may not always be commensurate to the task.

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[1] *Comparative Law* (2nd ed., 1949), p. 71.

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[1] See Gutteridge, op. cit., p. 5, with further references.

THE PROTECTION OF MERCHANT SHIPS

By A. D. WATTS, B.A., LL.B. (CANTAB.)[1]

Introduction

THERE has developed in recent years a practice whereby ships having only the most tenuous of connexions with a State may be registered at one of its ports. It is therefore pertinent to examine the rules of law which determine the State which may exercise protection over a ship.

The proper exercise of protection is dependent upon the existence of some connexion between the injured party and the State claiming to exercise protection. That connexion must be strong, for,

> 'By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights. . . .'[2]

With individuals nationality is the tie which has habitually[3] been considered necessary before a State may claim that in protecting the individual it is asserting 'its own rights', and in relation to the protection of ships the analogy with individuals has proved strong. The conditions necessary for the protection of ships, as generally stated, expressly or by implication, may be summarized in two propositions:

(i) every ship must have a nationality which is dependent upon registration within a State according to its laws, and the evidence of which is the flag of that State rightfully flown;

(ii) the only State which may protect a ship is that State whose nationality the ship possesses.

While this statement of the law appears to be correct if regarded as a specific application of the more general so-called 'nationality of claims' rule, both the conclusion and the premiss, when closely examined, may be found suspect. For the right to protect a ship does not necessarily belong to the State whose nationality that ship has, nor is the legitimacy of ascribing to a ship a nationality of its own acceptable without question.

Nationality and protection

That the right to protect is not always simply a matter of nationality was affirmed in 1955 by the International Court of Justice in the *Nottebohm*[4] case. In that case it was held that, for the grant of nationality by a State to an individual to be effective to give that State the right to protect that individual, nationality must be 'real and effective': it must constitute 'a translation into juridical terms of the individual's connection with the State which has made him its national'. An individual's nationality which is not 'real and effective', although it is not necessarily contrary to international law and although in municipal law it may well continue to be fully effective, will not give the State concerned the right to protect him. As Judge Klaestad observed in his Dissenting Opinion,[1] the decision exemplified 'a severance of diplomatic protection from the question of nationality'.

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[1] Whewell Scholar in International Law in the University of Cambridge.

[2] *Mavromatis Palestine Concessions* (*P.C.I.J.*, Series A, No. 2).

[3] The *Nottebohm* case (*Liechtenstein* v. *Guatemala*) Second Phase (*I.C.J. Reports*, 1955, p. 4), modifies the usual statement of the law; this is further considered below, on this page.

[4] The *Nottebohm* case (*Liechtenstein* v. *Guatemala*) Second Phase, loc. cit.

The problem which has to be faced is that conferring nationality on individuals is, by general agreement, a matter almost entirely of municipal law;[2] but this act, although unilateral (as far as international society is concerned), has international implications. It is accordingly felt that it is not desirable that a status, the conditions for the enjoyment of which are determined by one State in the light of its own policies, should automatically be the basis of rights of that State against other States. The concept of 'effective nationality' has evolved as the solution to this problem, first as treaty law specifically concerning dual nationality,[3] and recently developed by the International Court into a general rule of customary international law governing the right of a State to exercise protection.[4]

Similar considerations apply to ships. The conditions which must be fulfilled before a ship is entitled to fly a State's flag and to carry documents attesting that it is attached to that State are determined by each State for itself;[5] but the unilateral action taken by a State in regard to the nationality of its ships has important international consequences. Even more than with the conferment of nationality on individuals, the conditions on the fulfillment of which the registration of a ship depends[6] are often unrelated to any considerations of a genuine link with the particular State, but are dictated by the demands of national commercial policy. The 'paper nationality' which a ship may obtain by registration should not *per se* be sufficient to form the basis of protection; a more direct and effective link must be sought.

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[1] At p. 30.

[2] See the Convention on certain questions relating to the conflict of Nationality Laws, signed at The Hague, 12 April 1930 (*League of Nations Treaty Series*, vol. 179, p. 89); *Nationality Decrees in Tunis and Morocco* (*P.C.I.J.*, Series B, No. 4); the *Nottebohm* case (*Liechtenstein* v. *Guatemala*) Second Phase (*I.C.J. Reports*, 1955, p. 4).

[3] E.g. Protocol concerning Military Obligations in Certain Cases of Double Nationality, signed at The Hague, 12 April 1930 (*League of Nations Treaty Series*, vol. 178, p. 227).

[4] In this respect it is suggested that, taking the *Nottebohm* case and the *Reparations* case (*I.C.J. Reports*, 1949, p. 174) together, the International Court of Justice might be regarded as having placed the rule of nationality of claims on a sounder basis from the point of view of its origin and the development of international law: for the former case is reminiscent of the original practice whereby non-nationals who possessed an effective link with a State (by, for instance, long residence) were protected (see Sinclair, in this *Year Book*, 27 (1950), p. 125), while the latter case recognizes that a rule, which originated in the context of States, is capable of keeping up with the development of international law, so that it now includes international organizations.

[5] The *Muscat Dhows* case, Permanent Court of Arbitration (1905), No. IV; Article 29, *Articles concerning the law of the sea* (Report of the International Law Commission covering the work of its Eighth Session). But, of course, a State's freedom in this matter might be restricted or governed by a treaty.

[6] For a survey of the shipping legislation of various States see below, pp. 58–63.

Legal personality of ships

To ascribe to a vessel a nationality of its own involves a vessel having a distinct legal personality. Although it is not unknown for legal personality to be possessed by other than natural persons, there are serious objections to the attribution of legal personality to ships.

Legal personality is a technical concept which involves the possession of rights and duties in law. Being conferred by law it is not necessarily co-extensive with either human personality or with mere existence, and its possession by any entity will depend on many extra-legal considerations. But although legal personality is a purely juristic concept, it is to be remembered that it is an abstraction from social facts, and unless it is modelled with reference to those facts it cannot be expected to help in the solution of problems arising in the application of law to life.[1]

While a ship may merit slightly different treatment from other chattels, particularly because of its size, its value and its ability to travel great distances, this is no sufficient reason for a ship to have a legal personality of its own. It is sometimes alleged that a ship does have a personality of its own in municipal law, arising out of its liability *in rem*. However, it has been said[2] that

> 'the legal nature of proceedings *in rem* in Admiralty has been much discussed in the English courts during the last fifty years and for practical purposes it may now be accepted as finally settled that proceedings *in rem* against a ship to recover payment of damages have nothing to do with the idea of a ship as a personal wrongdoer. The proceedings are not against the ship but against someone who is personally liable, and the arrest is only the means of compelling him to appear and thus give the court jurisdiction over him personally.'

Nor, in considering the personality of ships, does there seem to be any accurate analogy to be drawn from the legal personality of corporate bodies. International law recognizes that corporate bodies have, in municipal law, a personality distinct from that of their shareholders, since it is recognized that a State may bring an international claim on behalf of a corporation as distinct from its shareholders.[3] But any attempted analogy between ships and corporations ignores the nature of legal personality as a concept which must accommodate the technical requirements of law as well as prevailing social reality. The differences between corporations and ships in the manner in which they come into existence and the functions they perform are of such a nature as to make any analogy inconclusive: further, in our present industrial society there is a need to treat corporations as legal persons which finds no counterpart in relation to ships. As Professor Ripert has said, 'le navire est juridiquement une chose, objet d'une droit de propriété'; and later he says, 'il faut . . . considérer [le navire] comme objet de propriété; car il n'a qu'une personnalité subordonnée à un maître. Il est, si l'on veut, comme l'esclave antique, un instrument animé.'[1]

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[1] See Hallis, *Corporate Personality*; Lloyd, *Law of Unincorporated Associations*; Maitland, *Selected Essays*; Paton, *Jurisprudence.*

[2] Dobrin, *Law Quarterly Review*, 49, p. 249. As an illustration of the English judicial attitude to this matter see *The Tervaete*, [1922] P. 259, in particular the remarks of Scrutton L.J., at p. 270, and of Atkin L.J., at p. 274.

[3] See below, pp. 79–83.

To deny that a ship can properly have a nationality of its own is not, however, to deny the need for a link between a ship and a State. But the existence of such a link is not dependent upon any 'personality concept' of a ship, and to use the term 'nationality' in this connexion is confusing and inaccurate.[2] The artificiality of such usage is apparent in the statement that the 'sense in which [the term "nationality of a merchant vessel"] is used in a given case depends upon the purpose for which national character is to be ascertained'.[3] However, the usage of referring to ships as if they were natural persons is to some extent understandable, and, as Professor Ripert says,[4] 'la comparaison est pittoresque'; but, he continues, 'elle n'est point inexacte, *si on ne la force point*'.[5] It seems that the practice of referring to ships as if they possess a legal personality and a nationality is too well established for any reforms of language to be achieved: it is therefore all the more necessary continually to bear in mind that such 'personality' is not real, and, in particular, that the so-called 'nationality' which a ship is said to possess is only a pseudo-nationality which, while it may have to be given meaning in some circumstances,[6] cannot be treated as identical in nature with the nationality of an individual. The assimilation of ships to individuals, while it may be helpful as an analogy in certain circumstances, should not be made the premiss from which conclusions of law are drawn.[7]

Thus it is suggested that two propositions may be put forward:

(*a*) a State's ability to exercise protection does not necessarily follow from the possession of that State's nationality; and

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[1] Ripert, *Droit Maritime* (4th ed.), vol. i, pp. 274, 275, 276.

[2] See de Lapradelle and Niboyet, *Répertoire de droit international*, vol. 10, p. 9.

[3] Hackworth, *Digest of International Law*, vol. ii, p. 724. See also Jenks, 'The Criteria for Demarcating the Scope of Maritime Conventions', *Journal of Comparative Legislation and International Law*, 19 (3rd Series), p. 245.

[4] Ripert, op. cit., p. 275.

[5] Italics added.

[6] E.g. in the interpretation of treaties referring to 'British ships'.

[7] See the remarks of M. François, the Special Rapporteur of the International Law Commission, during the 500th Meeting of the Sixth Committee of the General Assembly (General Assembly, 11th Session, *Official Records*, Doc. A/C.6/SR.500).

(*b*) it is doubtful whether a ship has a sufficient legal personality to support the attribution to it of a nationality.

The 'nationality' of a ship cannot, therefore, usefully be considered to constitute that link between ship and State which is the basis of a State's right of protection. Other bases for the right of a State to protect a ship which are put forward are registration, or the flag, or national ownership, and it is to these criteria that attention must now be turned.

Registration as the basis for protection

It is a settled rule of international law that every ship must be registered in one State or another: it is also generally accepted that no State may register a ship which is already registered in another State.[1] It is also generally considered that registration within a State carries with it the right to fly that State's flag, and that registration confers upon a ship the nationality of the State in which it is registered. From that it is generally concluded that only the State in which a ship is registered may protect it. This, in fact, is the generally stated rule concerning the protection of shipping, and is usually justified by considerations of convenience, by the necessity of keeping order on the high seas, and by its compatibility with the requirement of international law that a State may only present a claim in respect of an injury to its nationals. Nevertheless, it is suggested that this usual statement of the law is historically unfounded and in practice unacceptable. In addition, in so far as it purports to make nationality consequent upon registration and the right to protect consequent upon nationality, it is, as already shown, faulty in theory.

It has for long been the policy of States to restrict certain commercial activities to ships having some connexion with the particular State. The extent of that connexion is freely determinable by each State for itself, and it is generally[2] recognized that in laying down the conditions the fulfilment of which will constitute that connexion, each State acts on the basis of its own particular policies and national interests. For example, the requirement that ships should be built in the State wherein they are registered was once widely required, for at a time when shipbuilding was a craft learnt by experience such a requirement both strengthened the shipping industry and denied to other States not possessing the necessary craft-experience the benefits of a large mercantile marine; but with the spread of industrialization, shipbuilding became possible without the craft background, and it then became more in the interest of States to drop the requirement of national build and to strengthen their merchant fleets by allowing vessels wherever built to be registered at their ports. Similarly, there is a tendency for weaker or new nations trying to attract foreign capital to have no requirement of national ownership.[1]

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[1] But see Article 4 of the Merchant Shipping Act, 1947, of the Irish Republic, which apparently allows for dual registration (Laws concerning the Nationality of Ships, *United Nations Legislative Series*, p. 86).

[2] See, *inter alia*, the *Muscat Dhows* case, Permanent Court of Arbitration (1905), No. IV; Bluntschli, *Droit international codifié*, Article 324; Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 478; Fauchille, *Traité de droit international public*, vol. i, part 2, p. 899; Gidel, *Le Droit international public de la mer*, vol. i, p. 80; Higgins and Colombos, *International Law of the Sea* (3rd ed.), p. 216; Oppenheim, *International Law* (8th ed.), vol. i, p. 595; Ortolan, *Règles internationales et diplomatie de la mer* (2nd ed.), vol. i, p. 180; Rienow, *The Test of the Nationality of a Merchant Vessel*, pp. 16 et seq.; Ripert, *Droit maritime* (4th ed.), vol. i, p. 276.

That British[2] shipping statutes are dictated purely by national policy is made clear in the statutes themselves: the Act of 1381[3] is passed in order to 'increase the Navy of England which is now greatly diminished'; the Act of 1490[4] is passed to strengthen the navy 'now decayed'; the Navigation Act of 1660[5] is enacted 'for the increase of shipping and encouragement of the navigation of this nation, wherein under the good providence and protection of God, the wealth safety and strength of this Kingdom is so much concerned'; and the Navigation Act of 1793[6] similarly recites that 'the wealth and strength of this Kingdom, and the prosperity and safety of every part of the British Empire, greatly depend on encouragement given to shipping and navigation'. That the words in the statutes are no idle incantations is evident from the following account of English maritime policy from 1651:

> 'Quand le Protecteur voulut assurer à la marine anglaise un fret abondant, réserver à son pays le rôle de "roulier de la mer", et ruiner le rival hollandais, il créa[7] un protectionnisme maritime très sévère. Le protectionnisme fut maintenu par ses successeurs . . . et dura jusqu'à la seconde moitié du XIXe siècle, jusqu'au jour où l'Angleterre fut assez forte pour trouver son intérêt dans une liberté absolue de la navigation.'[8]

The commercial policies inspiring the Navigation Acts were given effect by provisions in those Acts since 1381[9] reserving certain trading activities to British ships. These Acts encouraged British shipping by ensuring to it a lucrative trade and at the same time crippled foreign merchant fleets by depriving them of that trade. At first no definition of 'British ship' was considered necessary, but in time the need for further proof of national character was required. The reason for requiring such proof is indicated in two important statutes. The Navigation Act, 1660,[10] required a declaration to be made in certain terms, upon which a certificate will be issued, 'for the prevention of all frauds which may be used in colouring or buying foreign ships'; this policy of documentation was developed by the Navigation Act, 1698,[1] which provided that 'for the more effectual prevention of frauds which may be used to elude the intention of this Act, by colouring foreign ships under British names', no ship would be deemed a British ship unless registered as such. The system of registration becomes recognizably modern in 1786.[2]

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[1] See Ripert, op. cit., vol. i, p. 306.

[2] For American policy (which was the same as the British) and practice see Kent, *Commentaries on American Law*, vol. iii, p. 139; and for a Spanish law of 1500 for the benefit of Spanish shipping interests see ibid., p. 139, footnote.

[3] 5 Ric. II, c. 3.

[4] 4 and 5 Hen. VII, c. 10.

[5] 12 Car. II, c. 18.

[6] 26 Geo. III, c. 60.

[7] Navigation Act, 1651.

[8] Ripert, op. cit., vol. i, p. 159.

[9] 5 Ric. II, c. 3; also 6 Ric. II, c. 8; 14 Ric. II, c. 6; 4 & 5 Hen. VII, c. 10; 23 Hen. VIII, c. 7; 1 Eliz. c. 13; and 5 Eliz. c. 5.

[10] 12 Car. II, c. 18.

Registration is, thus, in origin a means of enforcing the provisions of statutes which had for their object the furtherance of national commercial policies; it is the prerequisite of the enjoyment of certain privileges or of subjection to certain liabilities of municipal law.[3]

The practice of States also shows the inadequacy of registration as the basis for the exercise of protection. The diversity of legislative provisions shows that registration does not necessarily represent that real and effective link which the *Nottebohm*[4] case declares to be essential for the exercise of protection; further, States and judicial tribunals do not appear to accept that the right to exercise protection is based upon registration.

The variations in the national requirements for registration can be seen from a comparison of the registration laws of several of the more important maritime States. The law of the United Kingdom provides[5] that no ship shall be deemed a British ship unless wholly owned by British subjects or, speaking generally, British companies.[6] Every British ship must, unless exempted, be registered, and any ship which should be registered but is not shall not be recognized as a British ship.[1] It is worth noticing that the appellation 'British ship' does not depend upon registration: the effect of registration is to entitle a British ship to the privileges of that status.[2] There are therefore three possible classes of ships in the eyes of British law—British ships entitled to be recognized as such, British ships not so entitled, and foreign ships. Provision is also made[3] for the exemption from registration of certain small vessels, in respect of which no provision is made for the normal form of documentation.[4]

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[1] 7 & 8 Will. III, c. 22.

[2] 26 Geo. III, c. 60.

[3] See, for example, *R.* v. *White*, 100 E.R. 1293; *Liverpool Borough Bank* v. *Turner* (1860), 29 L.J. Ch. 830; *The Andalusian* (1878), 3 P.D. 182; *Chartered Bank of India* v. *Netherlands India Steam Navigation Company* (1883), 10 Q.B.D. 521; Merchant Shipping Act 1894, s. 72 (57 & 58 Vict. c. 60); Canadian Shipping Act, 1934, s. 7 (i) (1934, Can. c. 44); and in the United States of America, *Sleght* v. *Hardstone* (Wharton, *International Law Digest* (2nd ed.), vol. iii, p. 705) and *Barker* v. *Phoenix Insurance Company* (Wharton, op. cit., vol. iii, p. 707). In the course of time registration has come to serve other purposes; e.g. it is a convenient means of ascertaining title in the property in question where ownership is a condition of registration, and it also provides a convenient method by which a State can view the general state of maritime affairs.

[4] The *Nottebohm* case (*Liechtenstein* v. *Guatemala*) Second Phase (*I.C.J. Reports*, 1955, p. 4).

[5] *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60) as subsequently amended. Laws concerning the Nationality of Ships, *United Nations Legislative Series*, p. 180. See also Temperley, *Merchant Shipping Acts*.

[6] 'S. 1. A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description; namely,

(*a*) British subjects:
(*b*) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions.'

But note the Order in Council, 1906, regulating His Majesty's Jurisdiction in Zanzibar, which provided in s. 3 that ' "British ship" includes a British ship within the meaning of the "Merchant Shipping Act, 1894", and also a ship owned by a British protected person, provided that it is not registered under a foreign flag' (Hertslet's *Commercial Treaties*, vol. xxiv, p. 1111); see also s. 4 of the Bahrain Order, 1952 (S.I. 1952, No. 2108).

In the United States of America[5] the basic law is still that of 31 December 1792[6] which lays down, as requirements for registration, that a ship must be built within the United States and wholly owned by citizens thereof. The modifications of this law have been slight. By an Act of 24 May 1938[7] it was provided that, in addition to the categories of ships mentioned in the 1792 Act, certain sea-going vessels wherever built, which engage only in trade with foreign countries and certain islands, may be registered in the United States. This Act marks a change in the policy of the United States which hitherto had always required national build for ships registered in the United States. The other important modification in the law of the United States has been in connexion with corporations. In 1896[8] a law was enacted providing that corporations constituted under the laws of the United States are deemed United States citizens and may therefore register their ships in the United States. This was affirmed by the Attorney-General of the United States in 1911,[9] who added that it made no difference that some of the stock might be held by aliens. But a law of 1920,[10] modifying the 1896 Act, required that, for a corporation to be deemed a citizen of the United States, at least half the capital must belong to United States citizens while the president and managing directors must also be United States citizens. The United States also requires that all officers be citizens of the United States[1] together with three-quarters of the crew.[2] It is worth noticing that registration is not compulsory in the United States for those vessels entitled to it: it is rather considered as a privilege or advantage of which the owners may or may not avail themselves.[3]

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[1] S. 2. (1) Every British ship shall, unless exempted from registry, be registered under this Act:

(2) If a ship required by this Act to be registered is not registered under this Act she shall not be recognized as a British ship.

[2] See s. 72 which provides that a British ship not recognized as such is entitled to none of the privileges of a British ship but as regards liabilities is treated as if it were a British ship.

[3] S. 3.

[4] But see s. 373 which provides for a register of all British fishing vessels, and provides that non-registration of fishing boats capable of registration has the same effect as non-registration has on ordinary vessels by virtue of s. 72. Small vessels other than fishing boats are apparently exempt from any form of documentation.

[5] Laws Concerning the Nationality of Ships, *United Nations Legislative Series*, p. 186.

[6] 1 Stat. 287, which provides that: 'vessels built within the United States, and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States, and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by citizens, and no others, may be registered as directed in this title'.

[7] 52 Stat. 437.

[8] 29 Stat. 188: see also the Opinion of the Attorney-General of the United States quoted by Hackworth, *Digest of International Law*, vol. ii, pp. 747–9.

[9] Ibid.

[10] 41 Stat. 1008; also Shipping Act, 1916, 39 Stat. 729.

Registration in New Zealand[4] is dependent upon the fulfilment of much the same conditions as are required for registration in the United Kingdom.[5] Ships must be wholly owned either by British subjects or what may be called Commonwealth companies.[6] Any ship so owned must, unless exempted from registration, be registered in New Zealand or in some other Commonwealth country, and if not registered shall not be recognized as a New Zealand ship.[7] There is no provision for the documentation of any vessel exempt from registration.

The Law of the Union of South Africa[8] provides that no ship shall be registered in the Union unless wholly owned by the Government of the Union, South African citizens, citizens of Commonwealth countries, or Commonwealth companies.[9] Where a ship is wholly owned by such persons a majority of whom are resident in the Union, or where a ship so owned is principally controlled in the Union, it is obligatory to register the ship in the Union unless it is already registered elsewhere.[1] Certain vessels are exempt from registration,[2] although some of these have to be licensed.[3] There is also a provision that certain classes of ships 'shall be recognised as ships of South African nationality'.[4]

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[1] Laws Concerning the Nationality of Ships, *United Nations Legislative Series*, p. 188.

[2] Ibid.

[3] *Gaston* v. *Warner*, 272 Fed. Rep. 56.

[4] Shipping and Seamen Act, 1952 (Statutes 1952, No. 49); Laws Concerning the Nationality of Ships, loc. cit., p. 115.

[5] Above, p. 58.

[6] S. 385 (1), which provides that: '. . . a ship shall not be registered in New Zealand under this Act unless she is owned wholly by persons of the following descriptions . . . namely:

(*a*) British subjects:
(*b*) corporate bodies established under and subject to the law of a Commonwealth country and having their principal place of business in a Commonwealth country.'

[7] S. 386.

(1) whenever a ship is owned wholly by persons qualified to own a registered New Zealand ship, that ship shall be registered either in New Zealand in manner provided in this Part of this Act or in some other Commonwealth country in accordance with the law of that country, unless—
    (*a*) the ship is recognized by the law of a Commonwealth country other than New Zealand as a ship of that country, and is by the law of that country exempted from registration; or
    (*b*) the ship is, pursuant to the next succeeding sub-section, exempted from registration under this Act.
(2) Ships not exceeding 15 register tons employed solely on the coasts or inland waters of New Zealand are exempted from registration under this Act.
(3) if any ship does not comply with the requirements of sub-section one of this section, that ship shall not be recognized as a New Zealand ship.

[8] Merchant Shipping Act, 1951 (No. 57 of 1951); Laws Concerning the Nationality of Ships, loc. cit., p. 172.

[9] S. 11. (1) No ship shall be registered in the Union unless the whole of the ship is owned by the Government of the Union or by persons to each of whom one or other of the following descriptions applies:

(*a*) South African citizens;
(*b*) citizens of a country (other than the Union) which is a member of the Commonwealth; and
(*c*) corporate bodies established under and subject to the law in force in any part of the Commonwealth and having their principal place of business within the Commonwealth.

The ownership qualification for ships to be registered in Canada[5] is the same as that for the United Kingdom. Registration is, however, only obligatory for certain vessels; in effect those wholly owned by the appropriate persons and effectively controlled from the Union. For vessels so owned but managed from outside the Union registration is merely permissible.[6] Provision is made for the exemption from registration of certain small ships,[7] but these must be licensed.[8]

The law of France[9] concerning registration requires that the vessel be half-owned by French persons[1] who reside in France or in French possessions.[2] A certain proportion of the crew must be French and, although the precise law seems obscure,[3] it appears that in general the captain, officers, and three-quarters of the crew must be French citizens. The requirement of national build which used to be found in French law was apparently[4] discarded by Article 3 of the law of 19 May 1866.

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[1] S. 13. (1) whenever the whole of a ship of 25 or more gross tons is owned—
  (*a*) by the Government of the Union; or
  (*b*) by persons all of whom in terms of section 11 are qualified to own a South African ship, and—
    (i) a majority of the owners either in number or extent of ownership are persons resident in the Union or corporate bodies having their principal place of business within the Union; or
    (ii) the ship is, as to her management and use, principally controlled in the Union,
  the said Government or the said owners, as the case may be, shall, unless she is already registered in the Union or elsewhere apply to the proper office at one of the ports of registry . . . for the ship to be registered in terms of this Act.

[2] S. 13 (1) and (3).

[3] S. 68.

[4] S. 64. The following classes of ships shall be recognized as ships of South African nationality, to wit:
  (*a*) any ship registered under this Act;
  (*b*) any ship which . . . is deemed to be registered under this Act;
  (*c*) any ship licensed under this Act;
  (*d*) any ship other than a ship referred to in paragraph (*a*), (*b*) or (*c*) which is owned by the Government of the Union; and
  (*e*) any pleasure yacht of less than 25 gross tons—
    (i) the whole of which is owned by persons all of whom in terms of section 11 are qualified to own a South African ship; and
    (ii) the majority of the owners of which, either in number or extent of interest, are persons resident in the Union.

[5] Canadian Shipping Act, 1934 (1934 (Can.), c. 44); Laws Concerning the Nationality of Ships *United Nations Legislative Series*, p. 11.

[6] S. 7. (1) an unregistered ship which is wholly owned by the appropriate persons shall not have any rights or privileges accorded under the Act to duly registered vessels.
(2) Every British ship which is owned wholly by persons qualified to be owners of British ships and which is not registered out of Canada may be registered in Canada.
(3) Every British ship which is so owned by persons so qualified a majority whereof, either in number or in extent of ownership, are residents of Canada, and every British ship which being so owned by persons so qualified, is, as to its management and use, principally controlled in Canada, shall unless she is registered out of Canada, be registered in Canada.

[7] S. 8.

[8] Ss. 106, 107.

[9] Ripert, op. cit., pp. 300 et seq.; Laws Concerning the Nationality of Ships, loc. cit., p. 53.

A review of the legislation of other countries[5] stresses the diversity of requirements for registration. Norway[6] requires that a ship should be wholly owned by nationals, and if owned by corporations concerned with shipping, their control and principal offices must be in Norway, the directors must be Norwegian nationals, and six-tenths of their capital shares must be owned by Norwegians. Tunisia[7] requires 51 per cent. national ownership, and a Tunisian (or French) captain. Morocco[8] stipulates that the vessel's *port d'attache* must be in the French Zone of Morocco, that the vessel must be engaged in business ordinarily of direct and principal interest to the French Zone, that it must be three-quarters owned by Moroccans or Frenchmen, and that the proportion of national crew shall be fixed for various kinds of vessels (for merchant vessels the proportion is fixed at one-third, including the captain and officers). Greece[9] requires 50 per cent. national ownership, and all officers together with three-quarters of the crew must be nationals. Of particular interest, perhaps, are Panama and Liberia. Panama[10] has virtually no requirement of national ownership since a merchant vessel need only be partly the property of Panamanian citizens or of foreigners domiciled in the Republic with more than five years of residence therein to be deemed Panamanian, provided it is registered as such. The Liberian[11] law is even wider, since it provides that any sea-going vessel is eligible to be documented, wherever it may have been built, provided it is owned by a citizen or national of Liberia or of any foreign country. Other variations are legion: complete national ownership is apparently required by Spain,[12] Mexico,[13] Japan,[14] Portugal,[15] Brazil,[16] and Finland,[17] while the Netherlands[1] allows, as an alternative to complete national ownership, two-thirds national ownership with the remaining one-third owned by residents in the Netherlands; two-thirds national ownership is required by Sweden,[2] and Denmark[3] requires two-thirds ownership either by nationals or by persons resident in Denmark for five years; Belgium[4] similarly requires one-half ownership either by nationals or by aliens resident for one year in Belgium or domiciled there. Requirements of a national crew are equally diverse, varying between a four-fifths requirement in Spain,[5] a two-thirds requirement in Portugal[6] and Brazil,[7] and a complete absence of any such requirement in many other countries.

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[1] The position of corporate ownership is not settled by legislation. An *avis du Conseil d'État* in 1887, restating an *avis* of 1847, seems to have left to the Administration des Douanes the task of deciding whether a ship owned by a corporation could be registered. The matter is at present governed by the *Code des Douanes du 8 décembre, 1948*, Article 221.

[2] Residence abroad is permitted in certain circumstances (*Code des Douanes du 8 décembre, 1948*, Article 222 (2)).

[3] See Ripert, op. cit., pp. 314, 315.

[4] Ripert, op. cit., p. 299: but Article 219 (1) (*b*), *Code des Douanes du 8 décembre, 1948*, appears still to insist upon national build.

[5] See Ripert, op. cit., pp. 300 et seq.; Laws Concerning the Nationality of Ships, *United Nations Legislative Series, passim.*

[6] Laws Concerning the Nationality of Ships, loc. cit., p. 124.

[7] Ibid., p. 62.

[8] Ibid., p. 58.

[9] Ibid., p. 68.

[10] Ibid., p. 129.

[11] Ibid., p. 96.

[12] Ibid., p. 153.

[13] Ibid., p. 101.

[14] Ibid., p. 90.

[15] Ibid., p. 145.

[16] Ibid., p. 6.

[17] Ibid., p. 50.

With these very varied conditions to be satisfied before a ship can be registered, it would seem clear that it is no necessary consequence of registration that it constitutes evidence of that real and effective link required as the basis of protection: this is perhaps inevitable where the conditions of registration are determined by each State for itself according to the dictates of national policies and for the purpose of regulating the possession of privileges and advantages in municipal law. It is the great extension of the use of so-called 'flags of convenience' which has brought the point to the fore.

It would be an exaggeration to say that registration is never synonymous with a close connexion between ship and State: for example, statutes of the United Kingdom show, and have for long shown, such a connexion, as do the Canadian Shipping Act[8] and the South African Merchant Shipping Act.[9] It is nevertheless better to look for the substance of the basis of protection, not the accident of its reflection in a shipping register. The point is taken by the International Law Commission in its Articles concerning the law of the sea,[10] in which, in Article 29, it is provided that '*for purposes of recognition of the national character of the ship by other States*,[11] there must exist a genuine link between the State and the ship'.

While the municipal legislation of States shows registration to be an inappropriate test of the right of protection, international practice shows that the mere registration of a ship in a particular State is not considered to entitle that State to protect it. On the one hand, it is not always accepted that States may exercise protection over vessels registered at their ports; on the other hand, it seems that in certain circumstances vessels not registered in a particular State may nevertheless be protected by that State.

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[1] Ibid., p. 111.

[2] Ibid., p. 162.

[3] Ibid., p. 39.

[4] Ibid., p. 3.

[5] Ibid., p. 153.

[6] Ibid., p. 145.

[7] Ibid., p. 6.

[8] 1934 (Can.), c. 44; Laws Concerning the Nationality of Ships, loc. cit., p. 11.

[9] No. 57 of 1951; Laws Concerning the Nationality of Ships, loc. cit., p. 172.

[10] *Report of the International Law Commission*, covering the work of its Eighth Session.

[11] Italics added.

In *The I'm Alone*,[1] the vessel concerned was sunk by United States customs vessels on the high seas after it had allegedly been engaged upon smuggling operations in United States waters. The *I'm Alone* was registered in Canada and owned by a Canadian company, all the shareholders of which were Canadian. The Canadian Government protested to the United States, and in default of any settlement the issue was submitted to a Claims Commission. The Canadian argument was that the vessel, being owned by a Canadian company and registered in Canada, was entitled to Canadian protection in the form of an international claim to recover compensation for the loss of the vessel and its cargo. The United States, however, while admitting the facts of ownership by a Canadian company all the shareholders of which were Canadian, contended that this company held as 'trustee' for United States citizens from whom the purchase money for the vessel came and in whom rested the beneficial interest and the effective control. The Commissioners felt the weight of this contention, and held that 'in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo', although they went on to hold that the act of sinking the ship was unlawful. The fact of Canadian registry therefore availed the owners little, and the attempt to protect them was, when taken to a judicial tribunal, shown to be unjustified.

It is worth noting too that in the *Behring Sea Arbitration*,[2] concerning the seizure of British registered vessels on the high seas, another International Tribunal went out of its way to say that 'the question as to whether the vessels . . . were wholly, or in part, the actual property of citizens of the United States [has] been withdrawn from and [has] not been considered by the Tribunal'. It is perhaps not impossible that if it had been found that the vessels had been owned by citizens of the United States, the tribunal might have reached the same conclusion as the Commissioners in *The I'm Alone* were to reach later: the tribunal was at least aware that the mere fact of registration as a British ship might not be conclusive of the right to protect it.

The possibility of extending protection to non-registered vessels is affirmed by the United States–Venezuela Claims Commission in 1903 in *The Alliance*.[3] This vessel was owned by an American citizen and fraudulently registered in the Dominican Republic in the name of a Dominican, and the vessel carried the Dominican flag. The Commissioners held that since the register is only *prima facie* evidence of ownership, actual ownership may be proved like any other fact, and inasmuch as the vessel was owned by an American citizen, it possessed all the rights of American property; these would include, therefore, the right to the protection of the United States—even though not registered there.

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[1] 'Joint Final Report of the Commissioners', *American Journal of International Law*, 29 (1935), p. 329; see also Fitzmaurice, this *Year Book*, 17 (1937), p. 82.

[2] Moore, *International Arbitrations*, vol. i, p. 755.

[3] Hackworth, op. cit., vol. ii, p. 757.

A similar attitude has consistently been taken by the United States. The occasion for statements on the subject has usually concerned foreign built vessels owned by citizens of the United States, for such vessels were not entitled to registration in the United States. In 1854 the Attorney-General, Mr. Cushing, stated[1] that such foreign built vessels were, if owned by citizens of the United States, 'possessed of all the general rights of any property of an American', and were 'entitled to . . . receive the protection of the United States'. It has been said[2] of Mr. Cushing's statement:

> 'He only expressed views previously adopted by his government. He sustained them, however, with his usual consummate ability; they have never been departed from. His position has been reiterated by succeeding Secretaries of State, and similar opinions have been given by other Attorney-Generals.'

In 1870 Mr. Talbot, the Attorney-General, repeated Mr. Cushing's opinion,[3] and in 1872 Mr. Beaman, the Solicitor to the State Department, stated[4] in an opinion which was approved by the Attorney-General, Mr. Ackerman, that 'the navigation laws . . . in no way forbid citizens of the United States to own vessels built in other countries, nor is the protection of the United States denied to such foreign built vessels if they are owned by citizens of the United States'. These opinions are carried into effect in the Customs and Treasury Regulations of the United States.[5]

There is no recent practice of the United Kingdom in this matter since, from 1854, all vessels owned by British subjects are entitled to registration, irrespective of other considerations such as national build or national crew. Prior to 1854, 'the registry laws of Great Britain were very similar to those of the United States, but the courts of Great Britain held that though a foreign built ship could not be entitled to a British register, yet if wholly owned by British subjects such a ship was entitled to British protection'.[6]

In this context attention should also be drawn to those provisions of municipal law by which small vessels are exempted from registration:[7] in only some instances are such vessels required to be licensed, and even then not always all such vessels.[8] Protection cannot be denied to these ships, especially in view of the provision of section 440 (2) of the New Zealand Shipping and Seamen Act, 1952, that New Zealand ships which are exempted from registration are not prohibited from using the marine flag of New Zealand off the coasts of New Zealand, and section 64 (*e*) of the South African Merchant Shipping Act, 1951, which expressly provides that certain pleasure yachts shall 'be recognised as ships of South African nationality', notwithstanding that the Act provides for neither the registration nor the licensing of such vessels.

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[1] Wharton, op. cit., vol. iii, pp. 688–9.

[2] Morton P. Henry (Wharton, op. cit., vol. iii, p. 996).

[3] See the opinion of Beaman, Solicitor to the State Department (Wharton, op. cit., vol. iii, p. 680).

[4] Ibid.

[5] E.g. Articles 225 and 339 of the 1881 Customs Regulations, and Article 93 of the 1884 Treasury Regulations (Wharton, op. cit., vol. iii, pp. 689, 690 and 704); Article 82 of the 1923 Customs Regulations (Rienow, op. cit., pp. 113, 114).

[6] Opinion of Beaman, Solicitor to the State Department (Wharton, op. cit., vol. iii, p. 681).

[7] E.g. see Merchant Shipping Act, 1894, s. 3 (United Kingdom); Shipping and Seamen Act, 1952, s. 386 (2) (New Zealand); Merchant Shipping Act, 1951, s. 13 (Union of South Africa); Shipping Act, 1934, s. 8 (Canada).

[8] E.g. Merchant Shipping Act, 1951, s. 68 (Union of South Africa); Shipping Act, 1934, ss. 106–7 (Canada).

Municipal legislation also not infrequently provides that unless a ship is registered it will not be entitled to protection;[1] but it must not be assumed that therefore protection does depend on registration, for the exercise of protection is purely discretionary and restrictions imposed by municipal law on the exercise of that discretion are not necessarily binding in relation to the question of international law, 'When does the right to protect arise?'

It is further not without importance that even in municipal law registration is not always regarded as necessary or conclusive in establishing national character for municipal law purposes.[2]

However, to maintain that registration does not itself provide a basis for protection is not to say that registration is of no relevance in international law. It may well be that registration in a State is the foundation of that State's jurisdictional rights over the ship and acts occurring on board. The International Law Commission[3] has stated that ships shall sail under the flag of the State in which they are registered and, in general, shall on the high seas be subject to the exclusive jurisdiction of that State. Registration in any particular country being a voluntary arrangement between a State and an individual, it is not unreasonable that the individual concerned be considered to have submitted himself and his ship to that State's jurisdiction and laws. But internationally protection should not have a unilateral basis, for it is of necessity of inter-state concern: the protection-link should be objective, and such that it is compatible with the doctrine that a State in presenting an international claim is doing so in respect of damage to itself. This distinction between the right to exercise jurisdiction and the right to exercise protection has been clearly made in practice.[4] Similarly, it is by no means unreasonable that the use in treaties of such terminology as 'British ships' should be interpreted to mean ships registered in the United Kingdom; but this is a matter of construction and not of substance, and it does not necessarily follow that all British ships so defined may be protected by the United Kingdom. On this basis one of the paradoxes of *The I'm Alone* may be explained: for the Claims Commission, invested with jurisdiction[1] over any claims in respect of a 'British vessel' for compensation, took jurisdiction, thus considering the *I'm Alone* a British vessel for jurisdictional purposes, but held the *I'm Alone* not to be a British vessel for purposes of protection.

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[1] E.g. the Merchant Shipping Act, 1894, s. 72 (United Kingdom).

[2] See *The Princess Charlotte* (1863), Br. and L. 75; *R.* v. *Seberg*, L.R. 1 C.C.P. 264; *Le Cheminant* v. *Pearson*, 4 Taunt. 367; *R.* v. *Bjornsen* (1865), 34 L.J.M.C. 180; *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Navigation Company* (1883), 10 Q.B.D. 521; *The Maori King*, [1909] A.C. 562.

[3] *Articles concerning the law of the sea*, Article 30 and Comment thereon (*Report of the International Law Commission*, covering the work of its Eighth Session).

[4] E.g. the *Nottebohm* case (*Liechtenstein* v. *Guatemala*) Second Phase (*I.C.J. Reports*, 1955, p. 4); the *Costello* case, *Annual Digest and Reports of Public International Law Cases, 1929–1930*, Case No. 115; the *Flutie* case and the *Ruiz* case (Hackworth, op. cit., vol. v, pp. 825–6).

Registration is further of international significance in so far as every ship must, to avoid chaos on the high seas, be registered in some State. Such is the importance of this rule that any ship which is not registered may *jure gentium* be confiscated by any State meeting with it.[2] For instance, in the case of an immigrant ship which sailed to Palestine under the Turkish flag (to which it was not entitled), and which, on the approach of British naval vessels, raised the flag of Israel (a State not then in existence), the Privy Council[3] said that:

> 'the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, or are entitled to fly, the flag of a State which is within the comity of nations. . . . No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails. Their Lordships would accept as a valid statement of the law the following passage from Oppenheim's International Law—
>
> > ' "In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State."
>
> 'Having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence that she had a right, hauling it down on the arrival of a boarding party and later hoisting a flag which was not the flag of any State in being, the "Asya" could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure.'

It will, in the present state of maritime affairs, be usual for the State in which a ship is registered and the State which is entitled to exercise protection to be the same, for it will frequently be the case that registration will coincide with the required effective link. The situation is similar to that concerning individuals, where the nationality of an individual will more often than not indicate the State which may protect him. But in the same way that the nationality of an individual does not always indicate the State possessing the right to protect him, so it is with ships that, while registration can correctly be regarded as *prima facie* evidence of a right to protect, it must be remembered that the conclusive evidence lies elsewhere.

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[1] Convention between the United Kingdom and the United States of America respecting the Regulation of Liquor Traffic, 1924, Article 4 (*United Kingdom Treaty Series*, No. 22, 1924).

[2] Oppenheim, op. cit., vol. i, p. 595.

[3] *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351.

It cannot be ignored that States may sometimes regard a ship registered at one of their ports as having a very close connexion with the State concerned. It is, for instance, asserted that a State may protect alien seamen on board vessels flying its flag. However, the cases[1] which support such a contention are compatible with the view that an alien seaman may only be protected if he is serving on board a vessel which may itself be protected; they therefore do not lead to any necessary conclusion as to the right to protect the vessel itself. Moreover, the admissibility of such protection of alien seamen is itself not without question.[2]

Another indication of the regard States have for the tie created by registration is to be seen in provisions that time spent in service on board a national ship is counted towards any residence requirement for naturalization. The South African Citizenship Act, 1949,[3] and the United States Nationality Act, 1940,[4] contain such a provision, as also do certain Home Office instructions in 1904.[5] However, none of these provisions is dependent solely on registration,[6] for they require in addition that the vessel must operate from or to the State concerned; further, the shipping registration laws of the States are such that a registered ship in fact does have a very close connexion with the State concerned. It might therefore be fair to say that the criterion adopted has been the strong link between ship and State rather than mere registration.

The flag as the basis for protection

As the foundation of the right to exercise protection, the flag is of less value than registration, for it is widely recognized that the flag is a mere symbol of some other connexion with a State; reliance on the flag can, therefore, hardly be helpful, especially since it may, on occasion, be flown without any justification.[7]

It would seem that each State may decide for itself[8] who may or may not fly its flag, and may punish any improper use of its flag.[9] It is therefore difficult to distinguish a State's right in international law to allow a ship to fly its flag from the restrictions imposed by the municipal law of that State on the exercise of that right. However, it cannot be doubted that registration within a State carries with it the right to fly that State's flag.

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[1] See *McReady's Claim* (Moore, *International Arbitrations*, p. 2536); *Schrieber* v. *United States* (ibid., p. 2350); *Levois* v. *United States* (ibid., p. 2357); Weis, *Nationality and Statelessness in International Law*, p. 43.

[2] See *Hilson* v. *Germany* (*Annual Digest and Reports of Public International Law Cases, 1925–1926*, Case No. 198).

[3] No. 44 of 1949, s. 10 (2): Laws Concerning Nationality, *United Nations Legislative Series*, p. 402.

[4] 8 U.S.C.A. s. 725 (*a*).

[5] Piggott, *Nationality*, Part I, p. 314.

[6] In *Application of Aguirre and Others, International Law Reports* (1950), Case No. 51, a United States Court allowed an application for naturalization based upon service on a vessel chartered to a United States company but owned by a Panamanian company and registered in Panama.

[7] See *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351; *The Cayalte*, Moore, *Digest of International Law*, vol. ii, p. 966.

[8] Above, p. 53.

[9] See Merchant Shipping Act, 1894, s. 69; *The Maori King*, [1909] A.C. 562; Rienow, *The Test of the Nationality of a Merchant Vessel*, p. 142.

The practice of the United States holds, in addition, that ownership by a national, quite apart from registration, gives the right to fly the national flag to indicate such ownership. This is exemplified in sections 339 and 344 of the Customs Regulations of 1881:[1] the latter provides that

> 'as a citizen [of the United States] is not prohibited from purchasing and employing abroad a foreign ship, it is regarded as reasonable and proper that he should be permitted to fly the flag of his country as an indication of ownership.'[2]

Two solicitors of the State Department have given opinions to the same effect.[3] British practice on this point can hardly be conclusive, for since 1854[4] only British owned ships may be registered, and, unless exempted, British owned ships not so registered are entitled to none of the privileges of British ships, including *inter alia* the right to fly the British flag. This restriction on the flying of the British flag might be taken to mean that British practice holds that the right to fly the flag is dependent upon registration. However, during the Napoleonic wars the United Kingdom did not contest the right of ships owned by United States citizens but not registered in the United States to fly the United States flag,[5] and one may conclude that the British restriction is in virtue of national policy rather than a conviction that it is necessitated by international law. Similar conduct by citizens of the United States during the Franco-Chinese war towards the end of the nineteenth century raised no protest from the French Government, nor were any of the vessels concerned molested.[6] The permissibility of flying a State's flag without being registered in that State must also be admitted in the case of those vessels which are exempt from registration.[7] The practice of States seems to allow the flag sometimes to be flown in other circumstances: for instance where a State temporarily allows ships of other countries to fly its flag;[8] and also to indicate charter interests, as in the case of Chinese vessels chartered to United States companies, where the State Department advised that there was no objection to the flying of the

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[1] Wharton, op. cit., vol. iii, p. 690.

[2] Ibid.

[3] Beaman (Wharton, op. cit., vol. iii, p. 680) and Wharton (Wharton, op. cit., vol. iii, p. 687). See also J. Y. Brinton (Hackworth, *Digest of International Law*, vol. ii, p. 728); Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 478, 479; Morton P. Henry (Wharton, op. cit., vol. iii, p. 993).

[4] Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 18, 19.

[5] Wharton, op. cit., vol. iii, p. 691.

[6] Opinion of Morton P. Henry (Wharton, op. cit., vol. iii, p. 993).

[7] See particularly the New Zealand Shipping and Seamen Act (No. 49 of 1952), s. 440 (2).

[8] Below, p. 71.

American flag at the mast-head to designate charter interests, provided that it was intended that the vessel would continue to fly the Chinese flag aft and to operate under Chinese registry. The Department stated that this procedure would impose no burden upon the American Government beyond the protection of the interests of the American charterers.[1] The common denominator of this practice seems to be that the flag indicates to the world at large that the State whose flag is being flown has *some* interest in the vessel, and has to *some* extent taken upon itself various rights and duties in connexion with that interest.

It would seem that in view of these practices, a vessel might, in some circumstances, be entitled to fly more than one flag. Habitually, however, writers[2] maintain that the freedom of a State to grant the right to fly its flag is limited by the condition that a ship must not already be entitled to fly the flag of another State. It is suggested, with respect, that this traditional view is based on an unmerited equation of the right to fly the flag with registration: so understood, it is correct and reasonable, for, because of the jurisdictional consequences of registration, it is essential that there should be no double registration.[3] But if the right to fly the flag is understood as following from the possession by the flag State of some interest in the vessel, the possibility of more than one State being so interested, and, consequently, of the vessel being entitled to fly more than one flag, is apparent and comprehensible. The various flags indicate different interests, and in any particular situation the substance of those interests would need to be examined in order to see which State possessed the interest relevant to the case.

However, like registration, the flag a vessel flies can be regarded as *prima facie* evidence as to the State which is entitled to protect it. It is suggested that it was with this in mind that Dr. Lushington said[4] that British vessels include *inter alia* 'all vessels under the British flag, though not strictly entitled thereto, because, by the law of nations, the carrying of the British flag stamps on them, as to other nations, the British national character'.

However, although the flag might raise a presumption as to protective rights, it is the actual and not the apparent character of the vessel which determines the right to protect it. This is clearly shown in the case of *The Cayalte*,[5] the relevant facts of which, as well as the attitude adopted by the United States, are adequately set out in the note sent by Mr. Seward, Secretary of State, to the United States Minister in Japan. Mr. Seward said,

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[1] Hackworth, op. cit., vol. ii, p. 732.

[2] E.g. Oppenheim, op. cit., vol. i, p. 595.

[3] But see Article 4 of the Merchant Shipping Act, 1947, of the Irish Republic, which apparently allows for dual registration (Law Concerning the Nationality of Ships, *United Nations Legislative Series*, p. 86).

[4] *The Ionian Ships* (1855), 2 Sp. 212.

[5] Moore, *Digest of International Law*, vol. ii, p. 966.

> 'I have to acknowledge the receipt of your despatches . . . which relate to the bark *Cayalte*, at Hakodai. These documents tend to prove that the officers and crew of the vessel were Peruvian, and that, though the flag of the United States had been assumed with a view to protect the bark from belligerent capture during the war between Peru and Spain, the real owners were the captain, who is stated to have been a Portuguese, and Don Julian Zara Condigui . . ., as to whom there is no proof or suggestion that they were citizens of the United States. The presumption is that the use of our flag was a fraud and abuse to which this government can give no effect.'

The Privy Council took a similar view in the case of the immigrant ship already mentioned.[1]

It has been seen that the flag is only *prima facie* evidence of a State's right to protect a vessel. Nevertheless, a certain respect is owed by one State to the flag of another, and if any insult to the flag itself is suffered, the flag State may well be entitled to protest and to claim compensation for such indignity. This in fact seems to have been the attitude of the Commissioners in the case of *The I'm Alone*:[2] they held that although the sinking of the *I'm Alone* was not justified, and although it was a vessel of Canadian registry, nevertheless the Canadian Government was not entitled to protect the vessel itself. But the Commissioners went on to say that 'the act of sinking the ship . . . was . . . an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality . . . and should pay . . . $25,000 to His Majesty's Canadian Government'. It thus seems clear that the Commissioners were awarding damages because of the indignity directed at the Canadian flag, lawfully flown, and thus, in reality, an injury to British sovereignty.[3] Similarly, in the dispute concerning *The Colonel Lloyd Aspinall*,[4] an American merchant vessel carrying Government papers was seized by a Spanish vessel; Mr. Fish, Secretary of State, in his protest to the Spanish authorities, hoped that the Spanish Government would 'offer to the United States a suitable apology for the indignity to the flag of the United States', and also requested 'proper compensation to be made to the owners and to all other persons who have suffered by the seizure or detention', thus expressly dividing the complaint into two parts, the protection of the flag and the protection of the vessel flying the flag.

It is in this context that, it is suggested, the situations where vessels of one State are allowed temporarily to fly the flag of another State are properly to be considered from the standpoint of protection. Such a situation occurred when some Dutch vessels were requisitioned by the United States in the First World War and operated under the United

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[1] *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351; above, p. 67.

[2] 'Joint Final Report of the Commissioners', *American Journal of International Law*, 29 (1935), p. 329; above, p. 64.

[3] See Fitzmaurice, this *Year Book*, 17 (1936), p. 82, at pp. 92–94.

[4] Moore, *International Arbitrations*, p. 1007.

States flag, obtaining some protection as such;[1] also when the ships of certain north German towns sailed under the Danish flag, thus getting protection from piratical attacks, since by flying that flag they were able to benefit from an agreement which Denmark had concluded with the pirates.[2] The State whose flag is temporarily flown, while it cannot protect the ships in the sense of claiming compensation for damage to them since the requisite effective link will be lacking, can give them indirect protection, for any third State treating them unjustifiably might have to pay compensation for insult to the flag temporarily flown: therefore, although, if the ships are damaged, no compensation for such damage can be recovered *via* the temporary flag State, the likelihood of damage wilfully being done is very much reduced. This *de facto*, or indirect, protection, is distinct in nature and degree from normal protection: different in nature since it is not protection in respect of the ship itself, but in respect of the flag it temporarily flies; different in degree because such protection only renders the infliction of damage less likely, but is of no avail once damage has been occasioned.

The importance of flying the flag of the United Nations may similarly be considered. The possibility of protection by the United Nations of a ship authorized to fly its flag has been touched upon by the International Law Commission.[3] The Commission stated that

> 'it must not be forgotten that the legal system of the flag State applies to the ship authorised to fly the flag. *In this respect*,[4] the flag of the United Nations . . . cannot be assimilated to the flag of a State.'

However, the Commission was dealing with the question 'whether the United Nations . . . should be recognized as having the right to sail ships *exclusively*[5] under [its] own flag'. It is submitted with respect that there is no reason in principle for treating the flag of the United Nations differently from that of a State in the matter of protection. It might in practice be difficult to find that there is a sufficient real connexion between a ship and the United Nations to permit the exercise of protection by the United Nations in respect of the ship, but it is suggested that the indirect protection of a vessel by the protection of the flag of the United Nations which it flies may well be possible. That protection might be exercised by the United Nations was recognized by the Commission, for it expressed the opinion that 'Member States will obviously respect the protection exercised by the United Nations over a ship in cases where the competent organ has authorized the ship to fly the United Nations flag'.

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[1] Rienow, op. cit., pp. 146–9.

[2] M. Bluntschli, *Droit international codifié*, Article 328. For another example of such temporary flying of a State's flag see *Receuil des cours*, 10 (1925), p. 47, note 2.

[3] *Articles concerning the law of the sea.* Comment on Article 29 (*Report of the International Law Commission*, on the work of its Eighth Session). See also F. Florio, *Nazionalità della Nave e Legge della Bandiera*, pp. 165.

[4] Italics added.

[5] Italics added.

National ownership as the basis for protection

If, as has been suggested, a ship is considered to be a chattel, it would seem to follow that a vessel should be protected like any other chattel—as being the property of a person whom a given State may protect. National ownership would therefore be the appropriate criterion for the exercise of protection over private ships. Such a basis for protection is, moreover, in accord with the need for a real and effective link; for a ship, used at the control of and for the benefit of individuals, may properly be considered as effectively linked to the State with which those individuals themselves have a real and effective link.

The practice of States seems to confirm national ownership as the proper basis, for such practice supports two propositions: (i) that if registration is not coupled with *bona fide* national ownership, there will be no protection of the ship,[1] and (ii) that if there is *bona fide* national ownership but no registration, protection may nevertheless be extended to the vessel.

Support is scanty for the first proposition, and reliance must be placed yet again on *The I'm Alone*.[2] In that case Canada was not allowed to protect the *I'm Alone*, even though it was registered in Canada, since, in the words of the Commissioners, 'although a British ship of Canadian registry, [the *I'm Alone*] was owned, controlled and at the critical time, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States'. Clearly, therefore, it was held that in spite of the vessel's Canadian registry Canada was not entitled to protect it because of the element of alien ownership. This element of alien ownership did not make the registration of the *I'm Alone* invalid, since such registration was perfectly legal by Canadian law, the *I'm Alone* being owned by a company whose entire stockholding was Canadian; the element of American ownership existed because the company, though the legal owner of the vessel, was not the beneficial owner, for it held its property on trust for American interests. There was not therefore *bona fide* ownership by a Canadian national, and Canada was therefore not entitled to present a claim in respect of the injury to the vessel itself.

The second proposition, that a State may protect a vessel owned by its nationals, even though it is not registered at a port in that State, has more extensive support. In the case of *The Alliance*,[1] a United States citizen had fraudulently registered his vessel in the name of a Dominican and the vessel carried the Dominican flag. The United States–Venezuela Arbitral Commission, 1903, held that, since the register of a vessel is only *prima facie* evidence of ownership, actual ownership could be proved like any other fact, and since the vessel was owned by an American citizen, she possessed all the rights of American property; these include the right to be protected by the United States.

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[1] It should be noticed that if national ownership is a requirement for registration, then registration without such ownership might lead in one of two ways to an inability to exercise protection: for on the one hand, it might be said that there can be no protection because there is an absence of national ownership, such ownership being the criterion for protection; on the other hand it might be said that the absence of national ownership means that the registration is invalid, and that therefore there can be no exercise of protection because there is no proper registration. It is clear that only the first of these alternatives is of constructive value to the present argument.

[2] 'Joint Final Report of the Commissioners', *American Journal of International Law*, 29 (1935), p. 329; above, p. 64.

A case of considerable interest is that of *The Texan Star*,[2] one of the cases arising out of the Distribution of the Geneva Award. The *Texan Star* was built and owned in the United States, and was subsequently sold to a British subject and placed under the British flag. That was the position when the vessel was burnt by the Confederate cruiser *Alabama*, for whose activities the United Kingdom had had to compensate the United States. In the distribution of this money paid by the United Kingdom to the United States Government, the original owners of the *Texan Star* made a claim. The United States Government contended that the original owners were not entitled to make a claim since the vessel was British property, being owned by a British subject and flying the British flag. The American Court found in favour of the original owners, holding that the sale was collusive and must be regarded as void. The Court went on to say:

> 'it . . . seems that the complainants . . . whether with or without any register, owned property in the *Texan Star*; that the property was under the protection of the United States; that this property was lost to them from damage directly resulting from the act of the Confederate cruiser; that the ship was destroyed by the *Alabama* as an American ship, and as the property of American owners; and therefore the complainants come within the provisions of the Act of Congress[3] providing for the distribution of the Geneva Award'.

Of great importance is the view of the International Law Commission in its Articles concerning the law of the sea.[4] Article 29 states:

> 'Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for *purposes of recognition of the national character of the ship by other States*,[5] there must exist a genuine link between the State and the ship.'

In its comment on this Article the Commission stated that it

> 'thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognised, there must be a genuine link between the ship and the State granting permission to fly its flag. The Commission does not con-

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[1] Hackworth, *Digest of International Law*, vol. ii, p. 757.

[2] Moore, *International Arbitrations*, p. 2360.

[3] Act of 23 June 1874, s. 12.

[4] *Report of the International Law Commission*, covering the work of its Eighth Session.

[5] Italics added.

sider it possible to state in any greater detail what form this link should take. . . .[1] While leaving States a wide latitude in this respect, the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possesses a real link with its new State.'

Other examples of international practice are multitudinous. In the case of *The Patricia*,[2] a yacht, formerly British owned and registered, was sold to a citizen of the United States; the Attorney-General of the United States stated that 'the ownership of a vessel determines her national character. The *Patricia* is an American vessel and being the property of an American citizen is entitled to the protection of the laws of the United States.' Similarly, in the case of *The Diana*,[3] a vessel, owned by a naturalized United States citizen but foreign built (and therefore ineligible for American registration), was fired upon by the inhabitants of a Russian island, and the vessel's cargo of seal-skins taken. In the United States protest the incident was referred to as 'a case of wrong inflicted by Russian subjects upon a vessel owned by an American citizen, and entitled under our law to fly the flag of the United States in foreign waters and claim its protection there'. A similar statement was made by the State Department in the case of *The Arctic*.[4] United States Consular and Treasury Regulations[5] express the same views, admitting the protection of the United States over American-owned vessels which are not registered in the United States. Further strong support for the position taken by the United States is to be found in the Opinions of two solicitors of the State Department.[6] The last word on the practice of the United States can well be left to Chief Justice Kent, who, in *Barker* v. *Phoenix Insurance Company*,[7] summarized the position in saying that there were two kinds of American vessels, those registered in the United States, and those owned by United States citizens but not registered there: 'both kinds were recognized by law as American vessels, though the former was entitled to higher privileges under the laws of Congress. But in reference to the law of Nations, and to security upon the high seas, both species of vessels were equally entitled to protection as American property.'

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[1] In its Provisional Articles concerning the régime of the high seas (*Report of the International Law Commission*, covering the work of its Seventh Session) the Commission did attempt what it now considers impossible. Article 5 of the Provisional Articles provided:

> 'Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either:
>
> (i) be the property of the State concerned; or
> (ii) be more than half-owned by:
>   (*a*) nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
>   (*b*) a partnership in which the majority of partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
>   (*c*) a joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.'

[2] Hackworth, op. cit., vol. ii, p. 743.

[3] Wharton, op. cit., vol. iii, p. 672.

[4] Ibid., p. 675.

[5] See Wharton, *International Law Digest* (2nd ed.), vol. iii, pp. 689, 690 and 704.

[6] Beaman (Wharton, op. cit., vol. iii, p. 680) and Wharton (Wharton, op. cit., vol. iii, p. 687), the latter quoting extensive authority; see also the opinion of Morton P. Henry (Wharton, op. cit., vol. iii, p. 993).

[7] Op. cit., p. 707.

The practice of the United Kingdom is a little less positive, primarily because the British laws concerning the registration of shipping do not provide the same scope for legal and diplomatic pronouncements as does the law of the United States. Since 1854[1] the terms of the Merchant Shipping Acts have made registration dependent upon national ownership, the exercise of the discretion to protect shipping being restricted to those ships which are registered:[2] it is therefore impossible to determine whether protection, when exercised, is exercised on the basis of ownership or registration.[3] However, before 1854, when it was possible for a British subject to own a ship which could not be registered in the United Kingdom, British courts held such a ship, if wholly owned by British subjects, to be entitled to British protection.[4]

One of the criticisms which can be advanced against the view that the right to exercise protection depends upon registration[5] is that there exist provisions in the laws of many countries exempting certain vessels from the requirements of registration. Such vessels can, however, properly be protected on the basis of national ownership.

However, while it seems that the criterion adopted in practice is that of national ownership, it is clear that the national ownership must be *bona fide* and real. This has already been seen in considering *The I'm Alone*[6] and *The Texan Star*.[7]

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[1] Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

[2] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 72.

[3] The dispute concerning the *Cagliari* is somewhat anomalous (*State Papers* (1858), vol. 48, pp. 326–557). A vessel flying the Sardinian flag, and carrying Sardinian papers, was seized by a Neapolitan vessel. Two members of the crew were British, and on their behalf Her Majesty's Government properly made representations to the King of Naples. But after the release of the British subjects had been secured, the Government continued to take an interest in the vessel itself and the rest of the crew (all of whom were Sardinians), the Law Officers of the Crown having advised that the seizure was illegal. This strong interest was due more to the United Kingdom's great interest in maritime affairs than to the moral support which was professed for the Sardinian Government, and it is significant that when the vessel and crew were eventually released it was to the British, and not the Sardinian, authorities that the release was made. The Law Officers were consulted frequently on this case, and it is difficult to disagree with the view expressed in one of their earlier opinions in which they stated that 'we are of the opinion that the *Cagliari* (being a Sardinian merchant vessel, and no British subject, as we presume, having any share or interest in her), Her Majesty's Government cannot object to her seizure, if the Sardinian Government does not' (ibid., p. 380). That the Law Officers felt it necessary specifically to exclude ownership by British subjects, however, lends support to the view that national ownership may well be the proper basis for the exercise of protection over vessels.

[4] See the opinion of Beaman, Solicitor to the State Department (Wharton, op. cit., vol. iii, p. 680).

[5] Above, pp. 65–66.

[6] Above, pp. 64 and 73.

[7] Above, p. 74.

The State Department explicitly stipulated the necessity for such *bona fide* ownership in instructing consular officers in 1926 that they should scrutinize carefully the *bona fides* of transfers of vessels to American ownership, in order

> 'to discourage any attempt on the part of an American citizen to sell the protection afforded him by the American flag . . .; while the Department is desirous of giving adequate protection to vessels . . . owned by United States citizens and engaged in legitimate business enterprises . . . the Department is equally desirous of withholding Form No. 35 from vessels which have no legitimate claim to the protection of the American flag'.[1]

Although a State is entitled to protect a vessel if it is *bona fide* owned by its nationals, it must not be forgotten that every State has a complete discretion whether or not to espouse any claims. In *The Elena Valdez*,[2] the vessel, being registered in the United States, was purchased by a naturalized citizen of the United States: later, the new owner transferred the vessel to Panamanian registry. In this condition it was seized by Mexico, and representations were made to the State Department to secure its release. The Department replied that 'it does not consider it would be justified in bringing the matter to the attention of the Mexican Government'. Similarly in *The Hazlyn*,[3] the vessel was registered as a United States vessel, being American owned. It was, however, navigated under the Dominican flag, even though there had been no change of ownership, and on more than one occasion the master had paid, without protest, fees and dues imposed on vessels 'not of the United States'. The purpose of the owners in trying thus to give the vessel a dual national character is clear, for, while wanting to have Dominican character because of the commercial advantages it gave them, they also desired to retain the American register so that, in the event of any political troubles in the Dominican Republic, they could again raise the American flag and claim American protection; further they wanted to prevent the Dominican Government from using the vessel as they would be entitled to use a proper Dominican vessel. The State Department stated that the vessel was either Dominican or American, and must act consistently with whichever national character its owners chose; the vessel could not act as if it were Dominican, and then expect to have the privilege of the protection of the United States. In both cases protection was denied in spite of the existence of ownership by nationals of the State whose protection was sought. Nevertheless, it is submitted that national ownership should still be regarded as the criterion for the existence of the right to exercise protection, but that where there exist circumstances which considerably weaken the strength of the 'link' created by national ownership, a State will in all probability be disinclined to protect the vessel. Further, it is suggested that *The Elena Valdez* and *The Hazlyn* should not be taken as showing that no State may protect a vessel owned by its own nationals if it is registered abroad: it should be noted that in both cases the vessels were, or could have been, registered in the United States, and in such circumstances the importance of registration in another State is greater than it would be if no registration in the United States had been possible.

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[1] Hackworth, op. cit., vol. ii, p. 740.

[2] Ibid., p. 755.

[3] Ibid., p. 726.

Another situation in which it seems that a State will not exercise its discretion to protect is where the conduct of a vessel is such that the State whose protection is sought does not desire to give tacit support to such conduct by protecting the ship. Such cases most usually arise in connexion with smuggling offences,[1] but other instances are not unknown, e.g. the infringement of fishing rights in territorial waters[2] and the violation of shipping safety regulations.[3] Such cases are, however, clearly only examples of the discretion which a State has whether or not to protect a vessel, and the absence of protection is not due to doubts as to the legality of exercising protection.

The meaning of 'national ownership'

It thus seems that the conclusion that the protection of private shipping is dependent upon national ownership is supported by practice and at the same time conforms with the theoretical considerations concerning international protection and the position of vessels in international law. However, to use the concept of 'national ownership' is to ignore the ambiguities which are concealed in that phrase. The *Nottebohm*[4] case precludes one from saying that such ownership means simply ownership by a national of the protecting State. It is in fact necessary to say that 'national ownership' means 'ownership by any person whom the particular State may protect'.

The possibility may be mentioned that the refusal of a State to protect a vessel which shows a substantial connexion with another State[5] might, in fact, be more the consequence of a rule of international law than of the exercise of that State's discretion. For should the owner of a vessel link his vessel with a State other than that of which he is a national, that may well be considered, in certain circumstances, an indication that he has no effective link with his national State.

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[1] E.g. *The Henry L. Marshall* (Jessup, *Law of Territorial Waters and Maritime Jurisdiction*, p. 247); *The Kalakua* (Rienow, *The Test of the Nationality of a Merchant Vessel*, p. 104).

[2] In the *Moray Firth* cases the Norwegian Government made a formal protest in respect of some fishing vessels which were registered in Norway but which were English so far as capital, control and crew were concerned. The Norwegian Government, however, was in full sympathy with the policy behind the action taken against these pseudo-Norwegian vessels, and, immediately after making the formal protest, issued a warning to all owners of Norwegian trawlers fishing in the Moray Firth not to expect the protection of their Government should proceedings be taken against them (Fulton, *The Sovereignty of the Sea*, p. 728; Jessup, op. cit., p. 434).

[3] The *Archipelago-American Steamship Company* case (Hackworth, op. cit., vol. ii, p. 759).

[4] The *Nottebohm* case (*Liechtenstein* v. *Guatemala*) Second Phase, (*I.C.J. Reports*, 1955, p. 4).

[5] Above, p. 77.

Since the right of a State to protect a vessel depends upon its owner being a person whom that State may protect, any particular question concerning the right to protect a given ship can only be answered by considering the exact standing of its owner. In particular, two situations merit consideration—the protection of ships owned by non-nationals who are 'protected persons', and the protection of ships owned by corporations.

The right of a State to present a claim in respect of vessels owned by 'protected persons' depends upon the relationship between that State and those persons. If the State is entitled to represent them in international affairs, it is suggested that the State may also present a claim in respect of damage to their ships. Mention has been made[1] of the ships owned by the natives of Cutch, subjects of an Indian Protected State: since these natives were not British subjects they were not, owing to the provisions of the Merchant Shipping Acts, entitled to register their ships as British ships, and, therefore, the United Kingdom was reluctant to protect them. This reluctance can hardly have been due to the dictates of international law according to which the United Kingdom possessed the right to represent the natives of Cutch in international matters, and, therefore, also possessed the right to protect their property.[2] Further, if protection is based upon 'national ownership', the difficulties which might be thought to arise over colonial registers[3] are seen to disappear: for wherever a ship may be registered in colonial territories, that State which is entitled in international law to protect its owners as individuals is entitled to exercise protection over their ship.

Another, and more complex, problem relating to the concept of 'national owner' arises over the ownership of a ship by a corporation.[4] It would seem to be generally agreed that a corporation has a legal personality of its own distinct from that of the shareholders. Further, it is frequently asserted that a corporation has as its 'nationality' that of the State under whose laws it was created: if this is so, it should follow that an injury to the corporation should be the subject of a claim only by the State whose 'national' the corporation is, even where the shareholders are wholly nationals of another

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[1] Hall, *Foreign Jurisdiction of the British Crown*, p. 228, footnote.

[2] See Jones, *British Nationality Law* (1956), p. 195. See also the definition of 'British ship' in s. 4 of the Bahrain Order, 1952 (S.I. 1952, No. 2108).

[3] See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 4.

[4] See generally on the protection of corporations, Jones, this *Year Book*, 26 (1949), p. 225; Beckett, *Transactions of the Grotius Society*, 17 (1931), p. 175; Hackworth, *Digest of International Law*, vol. v, p. 840; Ripert, *Droit Maritime* (4th ed.), p. 370; McNair, *International Law Opinions*, vol. ii, pp. 32–39.

State. However, if the exercise of protection is now divorced from nationality in the case of individuals, it would hardly seem possible, in considering the protection of a corporation, to rely wholly on the 'nationality' of a corporation, especially where that 'nationality' is only artificial.

There are three distinct questions to be answered. First, may a State protect every company incorporated under its laws, even if the majority of the shares are held by aliens? Second, may a State protect a corporation incorporated abroad if the majority interest is owned by its nationals? Third, may a State protect the individual shareholders of its nationality should their interests in a foreign corporation be injured?

The theoretical approach, that only the State whose 'nationality' the corporation possesses may protect it, finds support in the *Agency of Canadian Car and Foundry Company* case, a case heard by the United States–German Mixed Claims Commission in 1939.[1] The United States presented a claim on behalf of a company registered in New York: Germany challenged the right of the United States to do so, since it was alleged that all the stock of the company was held by its parent company which was Canadian. The award was made in favour of the United States, the American Commissioner saying that 'it is a settled rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character'. Similarly, the State Department, whose advice had been sought by the United States Agent before the United States–Mexico Claims Commission concerning claims by the United States on behalf of a United States company the stock of which was totally held by British interests, stated that *in theory* the nationality of the owners is irrelevant to the right of the United States to protect a company registered in the United States:[2] but it is important to add that the State Department communication continued that it had long been the *practice* of the United States 'to refrain from pressing diplomatically the claims of American corporations in which there was no substantial American interest'.[3] And even the *Agency of Canadian Car and Foundry Company* case is not an entirely satisfactory precedent for the solution suggested by theory: for the American Commissioner first of all rebutted the allegation that the stockholding was entirely non-American, showing that in fact at the time the claim arose United States citizens held 30 per cent. of the shares, and that at the time the case was presented the American holding was 45 per cent.; he then added further reasons why the United States should be entitled to protect the company—there were large offices in the

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[1] Bishop, *International Law*, p. 544.

[2] Hackworth, op. cit., vol. v, p. 839.

[3] Ibid. See also the Report of the Law Officers of the Crown dated 13 December 1895 (McNair, op. cit., vol. ii, p. 39).

United States, there were large numbers of American employees of the company, and there were also considerable interests in the company held by American sub-contractors. The fact of incorporation in a State does not, therefore, seem to be regarded as sufficient by itself to entitle the State concerned to protect the company: in addition some substantial national interest would seem also to be required. This conclusion is supported by *The I'm Alone*,[1] where the element of substantial national interest was so strictly enforced that Canada was held not entitled to protect a vessel owned by a Canadian corporation, all the shareholders in which were Canadian, because the company held its property on trust for certain American individuals.

The second point at issue, whether a State may protect a foreign corporation if a substantial part of the shares are held by its nationals, must, if the theoretical analysis is accepted, be answered in the negative. Again, such an answer is supported by practice. In the *Arbitration between the Reparation Commission and the Government of the United States*,[2] the *Niobe* and eight other vessels were delivered to the Reparations Commission under the terms of the Treaty of Versailles as being the 'property of German nationals'. The ships belonged to the Deutsch Amerikanische Petroleum Gesellschaft, a company with registered offices in Hamburg: it was, however, a subsidiary company of the Standard Oil Company of the United States, which company owned all the shares and almost all the share-warrants and debentures, except for an infinitesimal amount. The Standard Oil Company therefore claimed that it had 'beneficial ownership' in the vessels and that they were accordingly not the 'property of German nationals', and had therefore been incorrectly handed over to the Reparations Commission. The matter was submitted to arbitration, and the American contention was rejected: the mere fact that virtually the entire interest in the D.A.P.G. was held by an American concern did not entitle the United States successfully to take up the company's case. A similar case is that of the *Mexicano*,[3] a vessel owned by a company created under Mexican laws which was in fact set up by the Pierce Oil Company, a United States company, solely because the Pierce Oil Company wanted to undertake activities restricted by Mexican law to Mexican vessels: all the shares in the Mexican company were held by the American company. The *Mexicano*, thus owned by a Mexican company, was registered in Mexico, and flew the Mexican flag. A situation arose in which the American holding company sought the protection of the United States for the *Mexicano*, but the State Department refused to afford any protection, saying that in the circumstances it 'does not consider itself justified in taking desired action for protection of steamer'. Another strong case is that of *Ruden and Company*,[1] a Peruvian company in which an American citizen had an interest. The company suffered injury, and the United States entered a claim against Peru. It was held that the United States was not entitled to make any claim on behalf of the foreign company. The principle behind these cases would appear to be correct, and it is suggested that a State should not be able to protect a foreign corporation just because all, or a majority of, the shareholders are nationals of that State. If only some, albeit a majority, of the shareholders are nationals of the protecting State, to allow that State to protect the company will involve that State in protecting the interests of aliens as well; those shareholders who are nationals of the protecting State can be well protected by other means, namely, as will be suggested below, by the protection, in certain circumstances, of their individual interests in the foreign corporation.

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[1] 'Joint Final Report of the Commissioners', *American Journal of International Law*, 29 (1935), p. 329; above, pp. 64 and 73.

[2] This *Year Book*, 8 (1927), p. 156.

[3] Hackworth, op. cit., vol. ii, p. 756.

Turning then to this last aspect of the protection of corporations, the protection of individual shareholders in foreign corporations, it is evident, if the theoretical dualism of corporation and shareholders is adhered to, that since the shareholders own none of the property of the corporation, damage to that property cannot be made the subject of a claim on behalf of any individual shareholder. As a general rule this might well be true enough. But it cannot be denied that international law knows and permits some exceptions. The *Delagoa Bay Railway Company*[2] case is perhaps the most widely quoted authority for such an exception: in that case the United Kingdom and the United States intervened on behalf of their nationals who had interests in a Portuguese company, and the legality of such intervention was, in principle, admitted by Portugal in submitting to arbitration. This case, together with some others,[3] and the analogy of municipal law, have been the basis for saying[4] that to the general rule denying a right to intervene on behalf of national shareholders in foreign companies there exists a limited exception where the foreign corporation suffers injury at the hands of the State which would normally be entitled to protect it, i.e. the State in which it is incorporated. There is, however, the possibility that this exception must be limited still further, so that a State is, in such circumstances, only entitled to protect national shareholders in a foreign corporation if the national shareholding interest amounts to a substantial proportion of the total. Article 3 of the Convention[1] establishing the United Kingdom–Mexico Claims Commission provides that

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[1] A. de Lapradelle and N. Politis, *Receuil des arbitrages internationaux* (1924), vol. ii, p. 589.

[2] Moore, *International Arbitrations*, p. 1865.

[3] In the *Ruden & Company* case it was held that, although the United States could not protect the Peruvian company in which a citizen of the United States had an interest, the United States could enter a claim on behalf of that individual's interest. Similarly, in 1938 Mr. Hull, the United States Secretary of State, wrote to the United States Embassy in China that 'Losses sustained by organisations not incorporated in the United States may be the subject of claims by this Government on behalf of American nationals only to the extent of the American ownership of such organisations' (Hackworth, op. cit., vol. v, p. 845). And see Beckett, loc. cit., and Jones, this *Year Book*, 26 (1949), p. 225.

[4] Beckett, loc. cit., Jones, loc. cit., in note 3 above.

> 'the Commission shall deal with all claims against Mexico for losses or damage suffered by British subjects or persons under British protection . . . by reason of losses or damages suffered by *any*[2] partnership, company, or association in which British subjects or persons under British protection have or have had an interest *exceeding 50% of the total capital*[2] of such partnership, company or association, and acquired prior to the time when the damages or losses were sustained.'

As for the attitude of the United States, Professor Hyde sums it up by saying:[3]

> 'At the present time the Department of State would probably not be reluctant to interpose in behalf of American shareholders or bondholders, should the foreign State of incorporation irreparably injure their interests through illegal conduct, and should there be offered no reasonable means of obtaining redress through domestic channels. . . . It might be regarded as essential that, as measured by the number of individuals concerned, or the amount of capital invested, the American interests should represent a *substantial portion*[4] of the stock of the corporation, or of its bonded indebtedness.'

If in fact this additional condition of a majority national interest must be fulfilled before the interests of the shareholders may be protected, then, considering also the conclusion reached earlier that it is probable that the corporation itself may not be protected unless there is a substantial national interest in it, it may be that it is now a rule of law that there must be a substantial national interest in a company before protection may be extended either to the company itself or its shareholders.

Indirect protection

A State is usually said to protect one of its subjects when it endeavours to call to account another State which is alleged to have injured that subject. There is, nevertheless, another aspect of protection which cannot be ignored —the indirect or accidental protection which, when a State exercises protection in respect of an injury to its national interests, incidentally, and as a matter of fact (but not necessarily of law), benefits a non-national interest.[5] This indirect protection is entirely independent of the so-called 'nationality of claims' rule; for so long as the requirements of that rule are satisfied in respect of the direct protection itself, the incidental results of such direct protection are fortuitous as regards the nationality of the parties benefiting therefrom.

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[1] *United Kingdom Treaty Series*, No. 11, 1928.

[2] Italics added.

[3] Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. ii, pp. 906 and 908.

[4] Italics added.

[5] E.g. *The Pellworm*, [1922] 1 A.C. 292.

Conclusion

The propositions which it has been the purpose of this article to substantiate can be briefly summarized in the following terms:

(i) International law is usually said to require that, before a private ship may be protected by a State, it must have the nationality of the protecting State, which it acquires by registration according to the laws of that State. The only State which may protect a ship is that State whose nationality a ship possesses.

(ii) But it is suggested that (*a*) a State's ability to exercise protection does not necessarily follow from the possession of that State's nationality, and (*b*) it is by no means certain that a ship has a sufficient legal personality to support the attribution to it of nationality.

(iii) The proper basis for the exercise of protection would appear to be either registration according to the protecting State's laws, or the flying of that State's flag, or ownership by a person whom that State may protect ('national ownership').

(iv) Registration is historically unfounded, and in practice unacceptable, as the basis for the exercise of protection.

(v) The flag is even more unacceptable since it is primarily only a symbol.

(vi) National ownership as a basis for protection, however, would appear to be in accord with the law concerning protection in general, and is also supported in practice. It is submitted that it is the proper basis for the exercise of protection over private shipping.

(vii) In addition, and as a subsidiary matter, there is, to a certain extent, an element of indirect protection which in certain circumstances would appear to be enjoyed *de facto*.

Having reached these conclusions concerning the protection of ships, it is further suggested that corresponding conclusions would be valid in relation to the responsibility of a State for injury caused by a ship. That State would primarily be responsible which would be responsible for acts done by the owners, it being borne in mind that considerations of nationality or an effective link are of less relevance to the responsibility of States than to the exercise by them of protection. The rights of a State to protect the dignity of its flag would also find a corollary in the responsibility which would attach to a State where it allows its flag to be flown by a vessel which conducts itself in a manner contrary to international law.

INTERNATIONAL RESPONSIBILITY OF STATES FOR UNAUTHORIZED ACTS OF THEIR OFFICIALS

By THEODOR MERON, M.J., LL.M., S.J.D.[1]

Humanitarian Trust Student in Public International Law in the University of Cambridge

I

Introduction

THE recent *Report on International Responsibility* prepared for the International Law Commission by the special *rapporteur* Garcia-Amador[2] in pursuance of Resolution 799 (VIII) of the General Assembly (which requests the International Law Commission to undertake the codification of the principles of international law governing State responsibility),[3] and the Project of Research at the moment being conducted for the International Law Commission by the Harvard Law School,[4] have focused attention once more on the law of responsibility of States for injuries to aliens.[5] The fact that almost a quarter of a century after the unsuccessful League of Nations Conference for the Codification of International Law, of 1930, a new attempt aimed at the codification of the law of responsibility of States for injuries to aliens is being made by the Community of Nations, and that it has already inspired another codification study by an important non-governmental institution, bears witness to the undiminishing importance of this part of international law. The present article is devoted to one of the more interesting and difficult problems in this field of law, which, in fact, proved to be one of the obstacles that hampered the work of the Hague Codification Conference.[6] Its object is to inquire whether a State is internationally responsible, and if so under what circumstances, for injuries done to aliens as a result of unauthorized acts of its officials. Assuming that some acts, if fully authorized, would entail the international responsibility of the State, could a State be responsible for similar acts committed by its officials in violation of its law?[1] It follows that, in order to come within the scope of the present article, an act must satisfy two conditions: (1) it must be an act of an official committed in excess or in abuse of authority, or otherwise illegal under the domestic law governing his competence, and (2) it must be an act of such a character that, if committed by an official within the limits of his authority under the domestic law, would engage the responsibility of the State under the law relating to injuries to aliens. Acts[2] of officials[3] which satisfy both these conditions will be subsequently referred to as '*ultra vires* acts'.

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[1] The writer did some of the preparation for this article while working as a research assistant for the Research Project on Draft Codification of the Law on Responsibility of States, now being undertaken by the Harvard Law School.

[2] U.N. Doc. A/CN. 4/96, of 20 January 1956.

[3] Of 7 December 1953, General Assembly, Eighth Session, *Official Records*, Supp. No. 17 (A/2630), p. 52.

[4] Garcia-Amador, op. cit., p. 7. See also 'Draft Codification of the Law on Responsibility of States', in *Harvard Law School Bulletin*, 7 (February 1956), p. 18.

[5] See, generally, Garcia-Amador, 'State Responsibility in the Light of the New Trends of International Law', in *American Journal of International Law*, 49 (1955), p. 339.

[6] See Briggs, *The Law of Nations, Cases, Documents and Notes* (1953), p. 617; Garcia-Amador, op. cit., p. 36.

Before proceeding, some further delimitation of the subject under investigation is necessary. The present article will be concerned solely with direct responsibility of States for *ultra vires* acts of their officials under customary international law. Questions of responsibility of States under international agreements,[4] of responsibility of international organizations, and the implications of the growing imposition of international obligations directly upon the individual official, will not be considered here. Although—generally speaking—the same rules govern the responsibility of States for acts of officials regardless of their status or category, this article will be primarily concerned with acts of officials belonging to the executive branch.

This paper is primarily concerned with the jurisprudence of international tribunals and the State practice in regard to responsibility for *ultra vires* acts of officials, and with past attempts at codifying the subject. However, before passing to the discussion of these sources and the principles of customary law which emerge from them, some brief observations are necessary concerning (1) the theory of State responsibility for *ultra vires* acts, and (2) the relation between domestic and international responsibility.

The theory of State responsibility for ultra vires *acts*

According to the accepted theory of the law of State responsibility,[5] the following elements are essential to establish responsibility of the State for a certain act of its official: (1) that act must be one in violation of a rule of international law, (2) it must be imputable to the State.[1] Imputability, which is the attribution of an act of an official to the State, is necessitated by the fact that all acts are those of individuals, while the international consequences of such acts—at least according to traditional international law—are imposed on the State which is the subject of rights and obligations.[2] Imputability is an independent process of international law. Once, by reference to the domestic law of the State, it has been determined that the actor is an official of the State,[3] international law—operating autonomously—may or may not impute that act to the State regardless of whether the act is so imputable in its domestic law.[4] Whether it in fact imputes a certain act to the State depends solely on there being an established customary rule of international law so providing.[5] There has been little doubt that authorized acts of officials are imputable to the State.[6] An authorized act of an official constitutes a classic example of an act of State, which is capable of engaging its international responsibility. However, doctrinal difficulties have arisen with respect to imputability of unauthorized acts. While the notion of imputability is accepted by many publicists,[7] some argue that it is impossible to impute to the State, which is a legal order,[8] acts committed in violation of that legal order.[9] Thus, a few writers, believing that only acts of State are properly imputable to the State, deny altogether its responsibility for *ultra vires* acts.[10] From subsequent pages of this article it will appear that such an attitude, taken in its extreme form, is quite contrary to customary international law. Certain other writers, although admitting that under a rule of international law States may be responsible for some *ultra vires* acts of officials, prefer to explain that responsibility on theory of vicarious liability (that is liability for acts of another), rather than on that of imputability.[1] Some of the difficulties encountered by the writers who hesitate to impute to the State acts of its officials committed in violation of its law could be eliminated if it were remembered that imputability is an independent process of international, not of domestic law, and that international law must not be substituted by domestic law as the basis of imputability.[2] This can be regarded as a basic implication of the principle of supremacy of international law.[3] However, it is not proposed to join here in the barren theoretical controversy as to whether the theory of vicarious liability or that of imputability should be accepted as a better explanation of responsibility of States for *ultra vires* acts of their officials since despite the differences in terminology, the practical consequences of both theories are the same. Their proponents are agreed that, under an existing rule of customary international law, States may be responsible for some *ultra vires* acts of their officials.[4] Undue importance need not be attached to the theory of imputability, which is, after all, 'but a legal methodology serving to nail responsibility on the State'.[5]

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[1] For classification of acts of officials from the point of view of conformity with international and domestic law see Anzilotti, 'La Responsabilité internationale des états à raison des dommages soufferts par des étrangers', in *Revue générale de droit international public* (referred to subsequently as *R.G.D.I.P.*), 13 (1906), p. 285, at p. 286. See also Eagleton, *The Responsibility of States in International Law* (1928), p. 51; Garcia-Amador, op. cit., p. 36.

[2] In this article the term 'act' includes 'omission to act', unless a contrary meaning is apparent in the context.

[3] Likewise the term 'official' includes 'organ', unless a contrary meaning is apparent in the context. Acts of organs are in the final analysis acts of governmental officials. See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 192.

[4] E.g. Article VIII of the N.A.T.O. Status of Forces Agreement, 19 June 1951, (U.S.) *Treaties and other International Acts Series*, No. 2846; Cmd. No. 8279.

[5] See, for example, Briggs, op. cit., p. 615; Garcia-Amador, op. cit., p. 31.

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[1] Also among such elements may be that of damage: this is, however, not of immediate importance to the present discussion.

[2] On imputability in international law see, generally, Anzilotti, loc. cit.; Ago, 'Le Délit international', in *Académie de droit international de la Haye, Recueil des Cours* (referred to subsequently as *Recueil des Cours*) 68 (1939) (ii), p. 420, at pp. 459 et seq.; Cohn, 'La Théorie de la responsabilité internationale', ibid., p. 209, at pp. 293 et seq.; Cheng, op. cit., pp. 180–207; Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law', in *Jewish Yearbook of International Law*, 1 (1949), pp. 226 et seq.

[3] Reference to the domestic law is required because in international law States are free to establish any kind of internal organization that they may desire. See Freeman, *The International Responsibility of States for Denial of Justice* (1938), p. 23; Kelsen, loc. cit., p. 228. However, Bisonette suggests that for purposes of imputability a certain body may be considered to be an organ of the State, if it is *prima facie* acting as such; see *La Satisfaction comme mode de réparation en droit international* (1952), p. 14. See also, generally, Silving's discussion of the case of 'Captain of Koepenick', in her article 'From the Sublime to the Ridiculous: a Study in Legal Symbolism', in *Tulane Law Review*, 30 (1956), p. 269, at pp. 283–4.

[4] Starke, 'Imputability in International Delinquencies', in this *Year Book*, 19 (1938), p. 104, at pp. 105–6; Cheng, op. cit., pp. 192–207; Anzilotti, *Cours de droit international* (1929), pp. 469–71.

[5] Freeman, op. cit., p. 23.

[6] Ibid.; Eagleton, op. cit., p. 52.

[7] E.g. Ago, loc. cit.; Cohn, loc. cit.; Cheng, op. cit.; Anzilotti, loc. cit.; Starke, loc. cit.

[8] See, generally, Kelsen, *General Theory of Law and State* (1949), pp. 181 et seq.

[9] For discussion of the connexion between the notion that imputability in international law is dependent on imputability in domestic law, and the 'dualistic' conception of the relationship between domestic and international law, see Garcia-Amador, op. cit., pp. 47–50.

[10] See, for example, Calvo, *Le Droit international théorique et pratique* (5th ed., 1896), vol. iii, p. 120, and writers collected in Soldati, *La Responsabilité internationale des états dans le droit international* (1934), p. 55.

It may then be asked what is the policy behind, or reasons for, the responsibility of States for *ultra vires* acts of their officials. On this point, it will be enough for the present to make only one observation: since many, if not most, injuries to aliens are caused by unauthorized acts of officials, and since States may limit the powers of their officials as they may deem appropriate, it is essential for protection of aliens that some measure of responsibility for *ultra vires* acts be admitted.

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[1] Thus, Freeman argues: 'The existence of international responsibility . . . is generally admitted; yet sound legal logic tells one that it is impossible to consider such an act as that of the State. It is plainly incapable of being imputed to the latter for the reason that it is contrary to the municipal law of the system to which imputation is sought. How can it possibly be said that in such a case it is the State—that system of positive law which prohibited that act . . . by specifically determining and limiting the official authority of the agent . . .—which has acted.' Op. cit., p. 25. See also ibid., pp. 23–26; Oppenheim, *International Law*, vol. i (8th ed., by Lauterpacht, 1955), p. 362.

[2] Briggs, op. cit., p. 617. See also Starke, loc. cit.

[3] See, generally, Garcia-Amador, op. cit., pp. 47 et seq.

[4] Normally, in international law, as opposed to administrative law, there is no question of validity or nullity of an *ultra vires* act; the only important question is that of damages. Whether damages are granted depends solely upon there being a rule of customary international law so providing, and it is not important whether such a rule is explained on theory of imputability (the unauthorized act is attributed to the State, which is therefore responsible for it), or on vicarious liability (that is responsibility for the acts of another). Proponents of both theories try to explain the same body of case law, and the scope of the application of both theories appears to be the same. Kelsen says that although 'An act the performance of which is not prescribed or permitted by the law of a state cannot be imputed to the state, i.e., interpreted as an act of the state . . . such an act may, according to international law, have the same legal effects as an act imputable to the state'. *Principles of International Law* (1952), p. 117. As a matter of legal logic, it may be suggested that the theory of vicarious liability may be more desirable than that of imputability. It may be also observed that a passage from Oppenheim favouring the vicarious liability approach was quoted with approval in *Royal Holland Lloyd* v. *United States* (1931), 73 Ct. Cl. 722, at pp. 736–7.

[5] Freeman, op. cit., pp. 25–26.

The relation between domestic and international liability

The further question arises whether it would be advisable to follow in international law the rules of domestic governmental liability for unauthorized acts of officials. The scope of governmental liability in tort, which in the past was strictly limited, has been recently considerably extended; and today, in both the United States[1] and the United Kingdom,[2] the Government can be vicariously liable for torts of its employees by analogy with the common law rules regarding vicarious liability.[3] Under such rules numerous *ultra vires* acts would be considered to fall outside the scope of the officials' employment and therefore not to engage the responsibility of the respective Governments. Moreover, the responsibility of the Governments under common law rules of vicarious liability is subject to far-reaching exceptions. Thus, the United States is not liable, *inter alia*, for wrongful exercise of 'a discretionary function or duty',[4] for the wrongful operation of certain services,[5] or for 'any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process. . . .'[6] Similarly, in the United Kingdom, the Crown is not liable for, *inter alia*, exercise of judicial functions, and the execution of judicial process.[7] It is submitted that in international law States may be responsible for injuries done to aliens by acts falling within some of these exceptions. A larger measure of responsibility for unauthorized acts of governmental officials has been admitted in France, where the *Conseil d'État* has tended to enlarge the scope of governmental liability, particularly through the possibility of *cumul des responsabilités de l'Administration et des fonctionnaires* and the growing recognition of liability based on objective risk, rather than on fault.[1] However, in France, also, the broad admission of liability is subject to some exceptions.[2]

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[1] The Federal Tort Claims Act (1946), sec. 410 (*a*), 60 Stat. 843–4 (1946); 28 U.S.C. secs. 1346 (*b*), 2674.

[2] The Crown Proceedings Act (1947), sec. 2 (1), 10 and 11 Geo. VI, c. 44.

[3] See, generally, Street, *Governmental Liability* (1953), pp. 26 et seq. Regarding the rules of vicarious liability in common law see Salmond, *The Law of Torts* (11th ed., by Heuston, 1953), pp. 105 et seq.; American Law Institute, *Restatement of the Law of Agency* (1933), secs. 213–29. See also 'Remedies against the United States and its Officials', in *Harvard Law Review*, 70 (1957), p. 827, at pp. 889 et seq.

[4] The Federal Tort Claims Act, loc. cit., sec. 421 (*a*); Cole, 'Torts—The Discretionary Function Exception in the Federal Tort Claims Act', in *Michigan Law Review*, 52 (1954), p. 733; Gellhorn and Schenck, 'Tort Actions against the Federal Government', in *Columbia Law Review*, 47 (1947), p. 722, at p. 729.

[5] The Federal Tort Claims Act, loc. cit., sec. 421 (*b*), (*f*), (*i*).

[6] Ibid., sec. 421 (*h*). See also Street, op. cit., pp. 52 et seq.

[7] The Crown Proceedings Act, loc. cit., sec. 2 (5). For other exemptions from liability see secs. 2 (2), 2 (1), 9 (1). See also Street, op. cit., pp. 37–46.

In the United Kingdom, the United States and France the limitation of governmental liability in tort may not have caused great hardship to aliens injured by *ultra vires* acts of officials. This is not necessarily true of countries in which the governmental machinery functions less effectively, and where abuses of authority occur more frequently, as, for instance, in States which have traditionally appeared as respondents in international claims. In accordance with the rule of exhaustion of local remedies, the more extensive the municipal liability of Governments becomes, the less room there is for international claims arising from *ultra vires* acts. None the less, it would be dangerous to apply generally the rules of domestic laws (with all their restrictive provisions) to the settlement of claims of aliens arising from *ultra vires* acts of officials. It is essential for the protection of aliens that international, not national, standards be followed. If the domestic law corresponds to the international standard, there is no room for an international claim, provided, of course, that no denial of justice has occurred. However, where the domestic law falls below the international standard, as, for instance, if it provides that the Government is not responsible for *ultra vires* acts which international law considers as entailing the responsibility of States, it is necessary to admit the possibility of international proceedings against the State.

However, the main object of this article is to examine the relevant sources of international law in a search for the criteria which determine the responsibility of States for *ultra vires* acts. The discussion which follows will of necessity have to be rather general, since the state of international law on this subject would not warrant an introduction here of the refinements of domestic laws regarding governmental liability.

II

NON-RESPONSIBILITY OF STATES FOR *ULTRA VIRES* ACTS

(*a*) *Case law*

There appear to be only few cases in international practice reflecting the view that States are not responsible for *ultra vires* acts of their officials. Prominent among them is the opinion of the United States Secretary of State Bayard regarding the *Tunstall* case.[3] Tunstall, a British subject resident in New Mexico, tried to escape with some horses in order to frustrate the execution of a writ which had been issued against him. He was pursued by a deputy sheriff, caught and shot in cold blood. In response to a British diplomatic interposition, Secretary Bayard denied the responsibility of the United States for the incident. The United States could not be responsible for what was 'not an act of the Government. It was executed . . . in opposition to its laws and in violation of its peace. Aside from other considerations, the doctrine of agency would wholly refute such a claim, for the rule of *respondeat superior* does not include acts . . . wholly outside the scope of the agency.'[1] The only remedy available was to be had by instituting proceedings against the individual wrongdoer. A similar position was taken by United States Attorney-General Griggs in the case of *Seal Fisheries–Behring Sea*,[2] which concerned an illegal seizure of arms aboard a foreign vessel by United States officials. Having conceded the illegality of the seizure, the Attorney-General stated that 'the torts of an officer may subject him to suit, but, not being within his orders as agent of the Government, the latter is not responsible for them'.[3] Similar views were expressed by other United States Attorneys-General,[4] by a few publicists,[5] and (*obiter*) in the case of *Forrest* (*U.S.* v. *Venezuela*).[6]

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[1] See, generally, Laubadère, *Traité elémentaire de droit administratif* (1953), pp. 466–535; Street, op. cit., pp. 56–76. Note also the possibility of action for *voie de fait*, ibid., pp. 74–76.

[2] E.g. with respect to judicial acts and *actes de gouvernement*, ibid., pp. 69–74.

[3] *Papers Relating to the Foreign Relations of the United States* (referred to subsequently as *Foreign Relations*) [1885], p. 450 (1886).

It would appear that many of these authorities were influenced by the then accepted principle of immunity of Governments from liability in tort, and by analogy with common law rules of vicarious liability, under which a principal was not responsible for acts committed by his agent wholly outside the scope of his agency.[7] They wrongly attempted to apply to international claims principles of domestic law regarding governmental liability, and thus 'to substitute the official's municipal law for international law as the basis of imputability and, consequently, for the determination of the international responsibility of the State'.[8] The only remedy available to the injured alien was to be found in instituting proceedings against the *ultra vires* acting official. And yet such proceedings, even if successful, might not always produce satisfactory results, since the resources of the official might not be adequate for the satisfaction of the judgment.

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[1] Ibid., p. 451.

[2] *Opinions of the Attorney General of the United States*, 22 (1900), p. 64.

[3] Ibid., p. 69.

[4] E.g. ibid., 13 (1873), p. 553.

[5] See Calvo, op. cit.; Bluntschli, *Das Moderne Völkerrecht der Civilisierten Staaten als Rechtsbuch dargestellt* (3rd ed., 1878), p. 261; and other publicists collected by Soldati, op. cit., p. 55. Note that Oppenheim's position appears to have been there wrongly stated. See Oppenheim, op. cit., vol. i (2nd ed., 1912), p. 218.

[6] Undated, decided under the Convention of 5 December 1885; Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898) (referred to subsequently as Moore, *Arbitrations*), vol. iii, p. 2944, at pp. 2946–7.

[7] See, for example, *Tunstall* case, above, p. 90. See also the *Note Doctrinale* of M. Lapradelle to the case of *Lacaze* (*France* v. *Argentina*, 1864), in which he discusses the extent to which the old view regarding non-responsibility of States for *ultra vires* acts of their officials was influenced by the civil law doctrine of mandate (under which the principal was not responsible for excess of power on the part of the mandatory), and by the internal public law doctrine of pecuniary non-responsibility of the Government for unauthorized acts of officials. Lapradelle et Politis, *Recueil des arbitrages internationaux, 1856–1872*, vol. ii (1932), p. 290, at pp. 301–2.

[8] See Briggs, op. cit., p. 617.

(*b*) *Previous attempts at codification*

The only attempt to adopt the principle of non-responsibility of States for *ultra vires* acts of their officials in a draft codification of international law was made in 1926 by the League of Nations Sub-committee of Experts for the Progressive Codification of International Law,[1] of which M. Guerrero was *rapporteur*. M. Guerrero proceeded on the theory that an unauthorized act could not juridically be considered an act of State, and although it might be illegal, yet 'from the point of view of international law, the offence cannot be imputed to the State'. He argued that 'just as the act of the official, accomplished within the limit of his competence, is, from the point of view of international law, an act of the State, because it constitutes an application of the national law . . . so an irregularity on the part of an official is an individual act'.[2] The flaw in M. Guerrero's argument is that his premiss that an *ultra vires* act cannot be imputed to the State in its domestic law does not support the conclusion that the same is true of international law.[3] Confronted with the argument that 'the existence of this responsibility is supported by the numerous precedents to be found in the past history of international claims', M. Guerrero stated in a rather sweeping fashion that it would be dangerous to attribute any value to such precedents in view of their being 'exiguous and conflicting'. The Sub-committee concluded that States are not to be responsible for injuries done to aliens 'by an official acting outside his competence as defined by the national laws',[4] except in cases of lack of due diligence in the prevention of the injurious act, or non-punishment of the wrongdoer, or denial of justice strictly construed as a refusal by courts to proceed with the action according to the national law. In the Comment to the Harvard Research on Responsibility of States for Injuries to Aliens of 1929, it was correctly observed that M. Guerrero's draft established 'a broad *ultra vires* doctrine'.[5] Since numerous injuries to aliens are caused by unauthorized acts of officials, and since States are at liberty to define as they wish the powers of their officials, it follows that the acceptance of M. Guerrero's views would make the protection of nationals abroad very precarious indeed.

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[1] Committee of Experts for the Progressive Codification of International Law, *Report of the Sub-committee*, League of Nations Publications (hereafter L.N. Pub.), 1926. V. 3, at p. 15; Conference for the Codification of International Law, *Bases of Discussion*, vol. iii, L.N. Pub. 1929. V. 3, at p. 252.

[2] L.N. Pub. 1926. V. 3, at p. 8.

[3] See also Briggs's criticism of Guerrero's theory, op. cit., p. 617.

[4] L.N. Pub. 1926. V. 3, at p. 15; L.N. Pub. 1929. V. 3, at p. 252.

[5] 'Harvard Research Draft Codification of the Law on Responsibility of States for Injuries to Aliens' (referred to subsequently as *Harvard Research*), in *American Journal of International Law*, 23 (1929), Supp., pp. 162–3.

III

RESPONSIBILITY OF STATES FOR *ULTRA VIRES* ACTS

Introduction. One of the more important factors which tended to supplant the old doctrine of non-responsibility by a new rule of responsibility of States for *ultra vires* acts of their officials was the recognition that the domestic law defence of *ultra vires* is unacceptable in international law. This recognition results from the fundamental principle of the supremacy of international law,[1] which implies that a State cannot escape its international obligations by invoking its municipal law.[2]

An example of the application of the principle of non-admissibility in international law of the domestic law defence of *ultra vires* is provided by the case of *Royal Holland Lloyd* v. *United States*.[3] It involved the detention in New York, during the First World War, of a neutral Dutch ship by United States customs officials who, while purporting to act in pursuance of a statute, exceeded their powers through erroneous interpretation, and detained the vessel without legal authority. The United States tried to invoke in its defence the rule of its domestic law under which it 'is not liable for tortious or unauthorized acts of its officers'. The Court rejected this argument and held that:

> 'The rights of the plaintiff as a citizen of a friendly foreign power, when considered in the light of the principles of the law of nations, are very different than those of a plaintiff relying wholly upon the municipal laws of the United States . . . the United States does not admit, by its statutes, any responsibility for the tortious or unauthorized acts of its officers. But in its relations with foreign nations the United States bears . . . a "wide, unlimited, unrestricted and vicarious responsibility" for the acts of its administrative officials.'[4]

§ 1. *Responsibility of States for acts committed within the apparent authority of their officials*

(*a*) *Case law*

(i) *The general rule.* The main principle which emerges from the examination of international arbitrations is that of responsibility of States for acts committed within the 'apparent authority', or 'general scope of authority', or under 'cover of authority' of their officials—these terms being synonymous.[1] If an official purports to act within his apparent authority, the State is responsible even if the official has exceeded his competence; provided, of course, that the act, if authorized, would be internationally wrongful. The practical application of this principle can be illustrated by the case of *Union Bridge Company* (*U.S.* v. *Great Britain*, 1924),[2] which involved an appropriation of neutral property by an official of the Cape Government Railways, who erroneously believed the property not to be neutral. The British Government's argument that there was no rule of international law which made the Government responsible for unauthorized acts of the official, was rejected by the Tribunal on the ground that the conduct complained of was within the general scope of duty of the official, and that the Government's liability could not be affected by the fact that the act was unauthorized. The appropriation constituted 'an international tort committed with respect to neutral property',[3] for which the British Government was internationally responsible. Similarly, in the case of *Maal* (*Netherlands* v. *Venezuela*, 1903),[4] which involved a claim for damages arising from maltreatment of an alien by police officials, it was held that 'the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for'.[5] Particularly frequent have been the instances in which States have been held responsible for *ultra vires* acts of their customs and law enforcement authorities. An illustration of an *ultra vires* act of customs authorities is provided by the case of *The Jessie* (*Great Britain* v. *U.S.*, 1921).[6] A British schooner hunting sea-otters in the North Pacific Ocean was boarded by an officer from a United States revenue cutter who placed her firearms under seal and ordered that the seals should not be broken as long as the vessel remained between certain latitudes. The officer, although acting *bona fide*, exceeded his authority and his acts were illegal. The United States denied its liability for the illegal acts. The Tribunal held that the acts of the officer violated the fundamental principle of freedom of the seas and the sovereignty of the State of the flag. For this violation the United States was responsible, since 'any Government is responsible for errors in judgments of it officials purporting to act within the scope of their duties and vested with power to enforce their demands'.[1] As to *ultra vires* acts of law enforcement authorities, it may be observed that such acts commonly occur in connexion with illegal arrests and detention of aliens longer than the permitted period.[2]

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[1] See, generally, Garcia-Amador, op. cit., pp. 48–50.

[2] See Article 2 of the *Harvard Research*, loc. cit., p. 133; Basis of Discussion No. 1 prepared by the Preparatory Committee of The Hague Codification Conference, League of Nations, Conference for the Codification of International Law, *Bases of Discussion*, vol. iii, L.N. Doc. C. 75. M. 69. 1929. V, p. 16; Article 5 adopted by the Third Committee of the Conference, *Minutes of 3rd Committee*, L.N. Doc. 1930. V. 17, p. 236; Briggs, op. cit., pp. 60–64.

[3] (1931), 73 Ct. Cl. 722; *American Journal of International Law*, 26 (1932), p. 399.

[4] (1931), 73 Ct. Cl. at 736–7. See also *Straughan* v. *United States* (1865), 1 ibid., 324, at 328–9; *McCalmont, Greaves & Co.* (*Great Britain* v. *U.S.*, 1855), U.S. Senate Exec. Doc. No. 103, 34th Cong., 1st Sess. (1856), p. 339; Moore, *Arbitrations*, vol. iii, p. 2866, at p. 2868.

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[1] Note, however, that Pons attempts to draw a distinction between 'apparent' and 'general' authority. *La Responsabilité internationale de l'état à raison de dommages causés sur son territoire aux étrangers* (1936), p. 180.

[2] *American and British Claims Arbitration, Report of Fred K. Nielsen* (1926) (referred to subsequently as *Nielsen's Report*), p. 376; *Reports of International Arbitral Awards* (1948–55) (referred to subsequently as *R.I.A.A.*), vol. vi, p. 138.

[3] Ibid., pp. 141–2.

[4] *Venezuelan Arbitrations of 1903*, Senate Doc. 316, 58th Cong., 2nd Sess. (1904), Report of J. H. Ralston (referred to subsequently as *Ralston's Report, Venezuela, 1903*), p. 914.

[5] See also *Compagnie Générale des Asphaltes de France* (*Great Britain* v. *Venezuela*, 1903), ibid., p. 331; *Venable* (*U.S.* v. *Mexico*, 1927), *United States and Mexico, Opinions of Commissioners under the Convention of September 8, 1923* (referred to subsequently as *U.S.–Mexico, Opinions*), *1926–7*, p. 331; *R.I.A.A.*, vol. iv, p. 219; *Arguello Heirs and Assignees* (*U.S.* v. *Mexico*, 1942), *U.S. Dept. of State Publication 2859, Arbitration Series 9* (*1942*) (referred to subsequently as *U.S.–Mexico, Reports 1942*), p. 589.

[6] *Nielsen's Report*, p. 479; *R.I.A.A.*, vol. vi, p. 57.

(ii) Ultra vires *acts and* ultra vires *legislation.* Most of the cases discussed so far concerned *ultra vires* acts. But injuries to aliens can also be caused by *ultra vires* legislation; and from the point of view of international law the rules which govern the responsibility of States for *ultra vires* acts equally apply to *ultra vires* legislation.[3] In the final analysis every injury is caused by an act of an official regardless of what his ultimate source of authority may be. Thus in the case of *Peabody* (*U.S.* v. *Mexico*, 1942),[4] Mexico was held responsible for the imposition of taxes on an alien by the State of Yucatan, which acted in pursuance of an invalid law. A similar position was taken in the early case of *The Fair American* (*U.S.* v. *Mexico*, 1841),[5] which involved a confiscation of the property of aliens by Mexican officials acting under regulations which exceeded the power of the executive, and were consequently invalid.

(iii) *Relation between responsibility and the motives for the* ultra vires *act.* The States may be responsible for wilfully and maliciously motivated *ultra vires* acts of their officials acting within the scope of their general authority.[1] Equally it would seem that illegal acts of officials caused by their *bona fide* errors of judgment may involve the international responsibility of the State. Several recent international arbitrations bear this out. Thus, in the case of *Union Bridge Co.* (*U.S.* v. *Great Britain*, 1924),[2] which involved an illegal appropriation of neutral property by an official of the Cape Government Railways, the Tribunal stated that the liability for the 'wrongful interference with neutral property . . . is not affected either by the fact that he did so under a mistake as to the . . . ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact . . . that there was no intention on the part of the British authorities to appropriate the material in question'.[3] A similar position was taken in the case of *The Wanderer* (*Great Britain* v. *U.S.*, 1921).[4] A British vessel was seized on the high seas by a United States revenue cutter for allegedly illegal possession of fire arms in a protected zone of fur-sealing. The United States revenue officers misinterpreted the statute on which they based their action and the seizure was therefore illegal under the United States law. The Tribunal, having found that the acts of the officials amounted to a violation of the rules of international law relating to the right of visitation and search, decided that the responsibility of the United States for such acts could not be affected either by the *bona fides* of the officers, or by the fact that the statutory provisions 'constituted a likely cause of error'.[5]

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[1] Ibid., pp. 58–59; see also *The Wanderer* (*Great Britain* v. *U.S.*, 1921), ibid., p. 68; *The William Lee* (*U.S.* v. *Peru*, undated, decided under the Convention of 12 January 1863), Moore, *Arbitrations*, vol. iv, p. 3405; *Lacaze* (*France* v. *Argentina*, 1864), *Lapradelle et Politis*, op. cit., p. 290, at p. 297. In his *Note Doctrinale* to this case, M. Lapradelle observes that 'l'usage constant des nations a consacré la responsabilité internationale de l'État à raison des actes dommageables de ses agents, alors même que ces actes sont contraires aux lois ou entachés d'excès de pouvoir', ibid., p. 301. Note, however, that the decision in Lacaze's favour might have been influenced by the terms of the *compromis*. *The Industry* (*U.S.* v. *Mexico*, 1842), Moore, *Arbitrations*, vol. iii, p. 3045; *The Only Son* (*U.S.* v. *Great Britain*, 1854), ibid., vol. iv, p. 3404; *McCalmont, Greaves & Co.* (*Great Britain* v. *U.S.*, 1855), ibid., vol. iii, p. 2866; Senate Exec. Doc. No. 103, 34th Cong., 1st Sess. (1856), p. 339; *The Canada* (*U.S.* v. *Brazil*, 1870), Moore, *Arbitrations*, vol. ii, p. 1733; *Lewis* (*Great Britain* v. *U.S.*, undated, decided under the Convention of 8 May 1871), ibid., vol. iii, p. 3019; *The Arménie* (*France* v. *Turkey*, 1895), *R.G.D.I.P.*, 2 (1895), p. 623; *The Coquitlam* (*Great Britain* v. *U.S.*, 1920), *Nielsen's Report*, p. 447; *R.I.A.A.*, vol. vi, p. 45; *Royal Holland Lloyd* v. *United States* (1931), 73 Ct. Cl. 722; *American Journal of International Law*, 26 (1932), p. 399.

[2] See, for example, *Underhill* (*U.S.* v. *Venezuela*, 1903), *Ralston's Report, Venezuela, 1903*, p. 49; *Roberts* (*U.S.* v. *Mexico*, 1926), *U.S.–Mexico, Opinions 1926–7*, p. 100; *R.I.A.A.*, vol. iv, p. 77; *Turner* (*U.S.* v *Mexico*, 1927), *U.S.–Mexico, Opinions 1926–7*, p. 416; *R.I.A.A.*, vol. iv, p. 278; *Knotts* (*U.S.* v. *Mexico*, 1929), *U.S.–Mexico, Opinions 1928–9*, p. 312; *R.I.A.A.*, vol. iv, p. 537; *Chazen* (*U.S.* v. *Mexico*, 1930), *U.S.–Mexico, Opinions 1930*, p. 20; *R.I.A.A.*, vol. iv, p. 564.

[3] It is assumed, of course, that the legislation is not only illegal under the domestic law, but also of such a character that, if legal, it would be capable of causing a violation of the law of responsibility of States for injuries to aliens.

[4] *U.S.–Mexico, Reports 1942*, p. 475. See also *Arguello Heirs and Assignees* (*U.S.* v. *Mexico*, 1942), ibid., p. 589.

[5] Moore, *Arbitrations*, vol. iv, p. 3369.

The cases considered seem to suggest that not only is an element of malice not essential to the establishment of responsibility, but even a total absence of fault will not be fatal to the claim; and they lend support to Anzilotti's concept of international responsibility as arising out of an objective violation of an international obligation *vis-à-vis* an alien, regardless of whether an element of fault was present.[6] The question whether a fault or only an objective violation of international law is necessary in order to establish the responsibility of the State is of course relevant not only to *ultra vires* acts, but to all aspects of State responsibility, and is therefore outside of the scope of this article.[7] However, it may be observed in passing, that the recent cases seem to show a tendency towards the recognition of objective liability, based on allocation of risk, rather than on a requirement of fault.[1] This tendency is not unparalleled by developments in domestic laws, and particularly in the French law regarding governmental liability. Borchard may have been right in observing that 'International Courts and Foreign Offices do not profess to make any fundamental distinction between wrongful, though perhaps innocent and unintentional, invasion of an alien's rights, and "fault"—the degree of wilfulness or negligence in the commission of an injury affecting mainly the measure of damages'.[2]

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[1] E.g. *The Arménie* (*France* v. *Turkey*, 1895), *R.G.D.I.P.*, 2 (1895), p. 623; *Post-Glover Electric Co.* (*U.S.* v. *Nicaragua*, 1900), *Foreign Relations* [1900], p. 833 (1902); *Baldwin* (*U.S.* v. *Mexico*, 1842), Moore, *Arbitrations*, vol. iv, p. 3235; *The Industry* (*U.S.* v. *Mexico*, 1842), ibid., vol. iii, p. 3045.

[2] *Nielsen's Report*, p. 376; *R.I.A.A.*, vol. vi, p. 138; see also above, p. 94.

[3] Ibid., p. 141.

[4] *Nielsen's Report*, p. 459; *R.I.A.A.*, vol. vi, p. 68.

[5] Ibid., p. 74. See also *The Favourite* (*Great Britain* v. *U.S.*, 1921), ibid., p. 82; *Nielsen's Report*, p. 515; *Royal Holland Lloyd* v. *U.S.* (1931), 73 Ct. Cl. 722; *The Jessie* (*Great Britain* v. *U.S.*, 1921), *Nielsen's Report*, p. 479; *R.I.A.A.*, vol. vi, p. 57.

[6] Anzilotti, loc. cit., pp. 286 et seq.; op. cit., pp. 496 et seq. See also, generally, Starke, loc. cit., pp. 114–16.

[7] For the various theories advanced by the publicists with respect to the question of fault see, generally, Eagleton, op. cit., pp. 208 et seq; Briggs, op. cit., p. 618.

(iv) *The relevance of the rank of the official to the determination of responsibility*. As with motive, the relevance of the status or rank of the official to the responsibility of the State is a question belonging to the whole field of responsibility of States for acts of officials, whether authorized or unauthorized, and can only be touched on briefly here.

International arbitrations reveal a great deal of confusion regarding the question whether States are responsible only for acts of superior officials, or also for those of inferior, or subordinate ones. Borchard, following some of the international arbitrations which accepted the former view, argued that the question whether a State is responsible for acts of its officials depends not only on the circumstances of the injurious act but also on the rank and the position of the injuring official.[3] Borchard's view is reflected also in Article 7 of the *Harvard Research Draft Codification* of 1929.[4] In practice, however, it is very difficult, if not impossible, to draw a clear dividing line between superior and inferior officials. Such a distinction may in fact cause great confusion and inconvenience and is, therefore, undesirable as a matter of policy. Moreover, international arbitrations hardly support the view that different rules of responsibility govern acts of inferior and acts of superior officials. Numerous cases which are normally cited for the proposition that States are not responsible for acts of inferior officials were actually decided on the ground that local remedies had not been exhausted.[5] This is particularly important in view of the fact that local remedies are more often available against inferior than against superior officials.[1] Practice shows that the defence of respondent States based on the inferior rank of the acting official was often rejected.[2] From the more recent arbitrations it appears clearly that the rank of the official is irrelevant to the determination of the responsibility, and that the only pertinent considerations are 'the character of the acts alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge'.[3] Thus, in the case of *Way* (*U.S.* v. *Mexico*, 1928),[4] which involved the death of an alien, killed in the course of an arrest made in pursuance of an invalid warrant issued wilfully by a Mexican judicial officer, it was stated that it was 'a sound principle that, when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which a nation must bear the responsibility'.[5]

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[1] See, generally, Dunn, *The Protection of Nationals, a Study in the Application of International Law* (1932), pp. 133–6, 161 et seq; Anzilotti, loc. cit.

[2] 'Theoretical Aspects of the International Responsibility of States', in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 1 (1929), p. 223, at pp. 224–5. See also Freeman, op. cit., p. 26. Starke observes correctly 'that malice or culpable negligence is neither a general condition of imputability nor in all cases an element essential to constitute the delinquency. The question depends simply on the requirements stated in the particular rule of international law which is applicable to the case under examination.' Loc. cit., p. 116.

[3] *Diplomatic Protection of Citizens Abroad* (1915), pp. 185–90.

[4] See below, p. 100.

[5] E.g. *Bensley* (*U.S.* v. *Mexico*, 1850), Moore, *Arbitrations*, vol. iii, p. 3016; *Blumhardt* (*U.S.* v. *Mexico*, 1875), ibid., p. 3146; *Slocum* (*U.S.* v. *Mexico*, 1876), ibid., p. 3140; *Leichardt* (*U.S.* v. *Mexico*, undated, decided under the Convention of 4 July 1868), ibid., p. 3133.

(v) Ultra vires *acts and the minimum international standard of justice.* Whether municipal law has or has not been strictly followed is important not solely as a defence frequently advanced by a respondent State in denial of its responsibility for *ultra vires* acts of its officials, but also with respect to the determination whether the particular conduct falls below the minimum international standard of justice.[6] Since the law of responsibility of States has established few precise formulas for the determination of the reasonableness and propriety of particular patterns of conduct of officials, the minimum international standard is often based on the national standard. It follows that a deviation from the national standard in the treatment of a particular alien may—in certain circumstances—involve a violation of the law of responsibility of States. For example, international law has not clearly established what is a reasonable period of time during which an alien may be detained pending an investigation or a trial. In such cases, a deviation from the national standard has often resulted in international responsibility, although the period during which the injured alien was actually detained would not necessarily have been considered unreasonably long as an original question. Thus, in the case of *Roberts* (*U.S.* v. *Mexico*, 1926)[7] an alien was detained nineteen months, although the Mexican

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[1] See Cheng, op. cit., pp. 195–6.

[2] E.g. *Moses* (*U.S.* v. *Mexico*, 1871), Moore, *Arbitrations*, vol. iii, p. 3127, at p. 3129; *Lewis* (*Great Britain* v. *U.S.*, undated, decided under the Convention of 8 May 1871), ibid., p. 3019.

[3] *Massey* (*U.S.* v. *Mexico*, 1927), *U.S.–Mexico, Opinions 1927–8*, p. 228; *R.I.A.A.*, vol. iv, p. 155, at p. 157; see also p. 159.

[4] Ibid., p. 391; *U.S.–Mexico, Opinions 1928–9*, p. 94.

[5] *R.I.A.A.*, vol. iv, p. 400.

[6] Regarding minimum international standard of justice see, generally, Freeman, op. cit., pp. 531–70; Borchard, 'The "Minimum Standard" of the Treatment of Aliens', in *Proceedings of American Society of International Law* (1939), pp. 51–74; Briggs, op. cit., pp. 618–20.

[7] *U.S.–Mexico, Opinions 1926–7*, p. 100; *R.I.A.A.*, vol. iv, p. 77.

Constitution established the maximum period of detention of one year. In answering the question whether this detention could be considered unreasonably long under international law, the Commission stated: 'Clearly there is no definite standard prescribed by international law', and 'an examination of the local laws fixing maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case.'[1] Having found that the detention was longer than the legal period under Mexican law, the Commission ruled that the detention 'was of such an unreasonable duration as to warrant an award of indemnity under the principles of international law'.[2] Thus the Commission inquired whether the domestic law had been followed, found that it had not, and considered the period of detention to be unduly long and falling below the international standard. This does not mean, of course, that an international tribunal is bound to reach such a conclusion in every case in which the requirements of the local laws have not been followed, or that it is bound in any way whatever by the national standard. The question whether domestic laws have been observed constitutes a useful but not conclusive criterion which is often followed by international arbitral tribunals.[3]

(*b*) *Previous attempts at codification*

With the sole exception of the draft of M. Guerrero's Sub-committee of Experts,[4] all draft codifications prepared in connexion with the Hague Conference for the Codification of International Law, of 1930, although varying in emphasis and in phraseology, recognized in principle responsibility of States for *ultra vires* acts of officials. As to the measure of responsibility, the majority of the draft codifications supported the principle of responsibility of States for acts committed by their officials acting within the scope of their apparent or general authority.

A convenient starting-point for the investigation of the past attempts at codification is provided by the draft of the Committee, headed by M. Strisower, which was prepared in 1926 for the meeting of the Institute of International Law to be held in Lausanne in 1927. In his Report, M. Strisower stated that the principle established by the precedents was that of the responsibility of States for the acts 'd'un fonctionnaire non compétent lorsqu'il a agi dans cette qualité et dans un rapport au moins apparent avec ses fonctions'.[5] This principle, which was justified on the ground that the authority conferred by the State on the official made the occurrence of the *ultra vires* act possible, was accepted in the draft convention prepared by the Committee.[1] A similar principle was adopted in the same year by the draft prepared by Professor Strupp, according to which States were to be responsible for acts of officials committed in excess of their legal authority, as long as they acted within their general authority.[2]

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[1] *U.S.–Mexico, Opinions 1926–7*, at pp. 103–4; *R.I.A.A.*, vol. iv, at pp. 79–80.

[2] Ibid. See also *Chazen* (*U.S.* v. *Mexico*, 1930), *U.S.–Mexico, Opinions 1930–1*, p. 20, at p. 26; *R.I.A.A.*, vol. iv, p. 564, at pp. 568–9.

[3] It may well be that, in cases of deviation from national law, tribunals are influenced, consciously or unconsciously, by the principle of responsibility of States for discrimination against aliens.

[4] See above, p. 92.

[5] *Annuaire de l'Institut de Droit International*, 33 (1927) (i), p. 461. See also ibid., pp. 459–63.

The most important attempt at codification made by a non-governmental body was probably that by the Harvard Law School in 1929. The *Harvard Research Draft Codification* accepted in Article 7 the rule of responsibility of States for acts committed by their officials 'within the scope of . . . [their] office or function', but under the influence of Borchard it introduced also the unfortunate distinction between higher and subordinate officials.[3] The Comment to the Article explained that the formula suggested was less ambiguous than the terms 'competence', 'authority', or 'jurisdiction', that it was familiar in the United States and French laws, and that it indicated that the State was responsible for unlawful acts of an official, 'provided he is acting within the general scope of his employment or function'.[4] It is, however, questionable whether the formula suggested by the Harvard Research is sufficiently clear to avoid ambiguities.[5] Indeed, the experience in the field of domestic law has shown how ambiguous terms similar to those employed in Harvard's formula may be.[1]

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[1] Article 1 of the Draft Convention provided that a State was to be responsible for acts committed by its organs in violation of its international obligations. Article 2 stated that 'L'État est responsable de ce chef de la manière de procéder de ses organes, même si elle est en contradiction avec ses lois ou avec les ordres d'une autorité supérieure. L'État est responsable des actes accomplis par ses organes, même en dehors de leur compétence, lorsqu'ils ont agi en se couvrant de leur qualité d'organes de l'État. Il n'en serait autrement que si l'acte incriminé était si manifestement étranger aux attributions de son auteur qu'aucune méprise ne pouvait raisonnablement se produire. . . .' Ibid., p. 557. Compare with the provision finally adopted by the Institute, ibid. 33 (1927) (iii), pp. 330–1; *American Journal of International Law*, 22 (1928), Supp., p. 330. See below, p. 112.

[2] *Abhandlungen zur Fortschreitender Kodifikation des Internationalen Rechts* (1927) (i), p. 31. See translation in *Harvard Research*, loc. cit., p. 235. See also Article 1 of the Draft Rules adopted in 1926 by the International Law Association of Japan in conjunction with the Japanese Branch of the International Law Association, *Harvard Research*, loc. cit., p. 231. Note, however, that the Article regarded fault as prerequisite to the establishment of responsibility.

[3] Article 7 provided: '(*a*) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress. (*b*) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.' *Harvard Research*, loc. cit., pp. 133–4.

[4] Ibid., p. 163.

[5] See Dunn's criticism of the Harvard formula: '. . . great difficulty arises in determining what is the scope of an official's authority. Seldom, if ever are officials given authority to commit wrongs. . . . Hence it might be argued that any wrongful act was outside the scope of an officer's authority . . . this would in large measure defeat the purpose of the institution of diplomatic protection. . . . It does not do much good to substitute the phrase "within the scope of the office or function" of the official, as is done in Harvard draft . . . since that has an almost equally wide borderland of doubtful meaning. Is a participation in a mob uprising by a police official "within the scope of his office or function"? Yet states have been held responsible for such acts.' Op. cit., pp. 135–6.

A convenient starting-point for the consideration of the governmental attempts at codification is provided by the requests for information submitted to the Governments by the Preparatory Committee of the League of Nations Conference for the Codification of International Law. In Point V, No. 2 (*b*) the Governments were asked whether States are responsible for 'acts of officials in the national territory in their public capacity (*actes de fonction*), but exceeding their authority'.[2] Out of the 20 Governments which answered directly this request for information, 4 Governments did not take up a clear position,[3] 3 answered in the negative,[4] but the overwhelming majority of 13 Governments answered in the affirmative.[5] The negative answers reflected M. Guerrero's old view that a State could not be responsible for unauthorized acts since such acts were not acts of State.[6] The Observation made on the basis of the various replies stated, *inter alia*, that 'since acts causing damage are frequently such as their authors were not authorized to perform, a rule restricting responsibility to the acts of officials acting within the scope of their authority would be inadequate'.[7] In Point V, No. 2 (*c*), Governments were asked whether States are responsible for 'acts of officials in a foreign country, such as diplomatic agents or consuls acting within the apparent scope of, but in fact exceeding their authority'.[8] This question, too, was answered in the affirmative by the great majority of the Governments.[9] The Observation, made on the basis of the replies received, stated that since the persons affected by the acts had no means of ascertaining whether the acts were within the actual authority of the official, the State, whom the official was representing, must be responsible for acts committed within the official's apparent authority.[1] All Governments answered in the negative the question included in Point V, No. 2 (*d*), which asked whether States were responsible for acts of officials 'unconnected with their official duties'.[2]

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[1] Regarding the difficulties encountered in determining whether a certain act is or is not within the scope of a servant's employment see, generally, Prosser, *The Law of Torts* (2nd ed., 1955), pp. 351–3; *Winfield on Tort* (6th ed., 1954), pp. 146–7. Observe, that, in determining whether a certain act of a servant has been committed within the scope of his employment, considerations with respect to whether the act has been committed within the apparent authority of the servant may be particularly relevant. See Salmond, op. cit., pp. 111–13; American Law Institute, *Restatement of the Law of Agency* (1933), sec. 229.

[2] Conference for the Codification of International Law, *Bases of Discussion*, vol. iii, L.N. Pub. 1929. V. 3, p. 74; see also ibid., pp. 74–78, and Supp., L.N. Pub. 1929. V. 10, pp. 3, 16–17.

[3] Austria, Hungary, Norway and the United States. While Austria appeared to be inclined towards an affirmative reply, Hungary, Norway and the United States tended towards a negative one, which they qualified by the condition that the respondent States exercised due care in the prevention of the injurious act, and that the injured alien could proceed against the individual tortfeasor.

[4] Czechoslovakia, Denmark and Poland.

[5] Australia, Belgium, Bulgaria, Canada, Finland, Germany, Great Britain, India, Italy, Japan, New Zealand, the Netherlands and South Africa.

[6] Poland admitted responsibility in the exceptional cases mentioned by Guerrero's Sub-committee. See above, p. 92. Czechoslovakia qualified its negative reply by the statement that 'mere orders of the internal administration restricting the official's powers cannot absolve the State from responsibility if the powers are not externally (juridically) defined'. Conference for the Codification of International Law, *Bases of Discussion*, vol. iii, L.N. Pub. 1929, V. 3, p. 77.

[7] Ibid., p. 78.

[8] Ibid.

[9] Observe that even Poland, which answered in the negative the preceding Point V, No. 2 (*b*), gave here a qualified affirmative reply. A rather typical affirmative reply was given by Great Britain: 'A Government is in general liable for the acts of an official, such as a diplomatic agent or consul, acting within the apparent scope of his authority in the country in which he is stationed

The adoption by the Governments, in their replies given to Points V, No. 2 (*b*) and (*c*), of the principle of responsibility of States for acts committed by their officials either at home or abroad, while acting within their apparent or general authority, is reflected also in Bases of Discussion Nos. 13 and 14, which were adopted in 1929 by the Preparatory Committee of the League of Nations Conference at the Hague. According to Basis No. 13, States were to be responsible also for *ultra vires* acts of their officials, if they 'purported to act within the scope of their authority'.[3]

The controversy regarding responsibility of States for *ultra vires* acts of their officials was clearly reflected in the discussions which preceded the adoption of Basis No. 13 during the Seventh and Eighth Meetings of the Third Committee of the League of Nations Conference for the Codification of International Law, of 1930.[4] While M. Guerrero and few others reiterated the old view as to non-responsibility of States for *ultra vires* acts of their officials,[5] the majority of the representatives were in favour of adopting the principle of responsibility, although they differed in their conception of the ultimate justification of the principle. It was agreed that the principle could not be supported by analogy to Roman law, since that law regarded *dolus* or *culpa* as essential to the establishment of responsibility.[6] While some representatives to the Conference attempted to found the principle of responsibility on analogy to English, German[7] and French[8] laws, the

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and causing prejudice to a national of that country, even though the official may have exceeded his actual authority as laid down by the laws of his own country or by his instructions. The national to whom loss has been caused has no means of knowing the instructions that the official may have received, nor is he presumed to be aware of the law of a foreign country.' Conference for the Codification of International Law, *Bases of Discussion*, vol. iii, L.N. Pub. 1929. V. 3, p. 80.

[1] Ibid., p. 82.

[2] Ibid., pp. 82–85.

[3] Basis No. 13 (ibid., p. 78) provided: 'A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State.' Basis No. 14 (ibid., p. 82) provided: 'Acts performed in a foreign country by officials of a State (such as diplomatic agents or consuls) acting within the apparent scope of their authority are to be deemed to be acts of the State and, as such, may involve the responsibility of the State.'

[4] Conference for the Codification of International Law, *Acts*, vol. iv, L.N. Pub. 1930. V. 17, pp. 82–103.

[5] Ibid., p. 88. See also the views of M. Sipsom of Roumania, ibid., pp. 99–100; and M. Abd el Hamid Badaoui Pacha of Egypt, ibid., pp. 96–97. Mr. Hackworth, of the United States, wanted to limit the responsibility to such acts as were performed by an official 'in the exercise of his function'. Ibid., pp. 96–97.

[6] Ibid., pp. 85–86, 93.

[7] Ibid., pp. 93–94.

[8] Ibid., p. 96.

rapporteur, M. de Visscher preferred to justify it by an objective theory of responsibility, not based on the requirement of fault, and necessitated by the need of 'making international relations secure'. Although an unauthorized act could not be considered an act of State there was a necessity of admitting responsibility or running the risk of 'not ensuring adequate reparation in many cases in which reparation is justly due'.[1] The representative of Great Britain, Mr. (now Sir) Eric Beckett displayed a characteristically English reluctance to commit himself to a general theory, and argued that it was sufficient that 'the great weight of the arbitral decisions is clearly in favour of some principle on the lines of Basis No. 13'.[2] In the vote which followed, an overwhelming majority of 20 Governments voted for the retention of Basis No. 13, while a minority of 6 voted against. The principle of responsibility of States for *ultra vires* acts of officials committed 'under cover of their official character' was incorporated in Article 8 (2) of the draft convention provisionally approved in the first reading by the Third Committee.[3]

(*c*) *Views of the publicists*

Many modern publicists, although sometimes differing in emphasis, phraseology, and even the doctrinal bases underlining the principle of responsibility of States for *ultra vires* acts, admit that States may be responsible for acts committed by their officials acting within their apparent or general scope of authority.[4]

Anzilotti was probably the most prominent among the modern writers on international law who have shown interest in responsibility of States for *ultra vires* acts of their officials. He rejected the attempts to base the principle of responsibility on fault (*culpa in eligendo*, *culpa in vigilando*, of the State, or *culpa* of the acting official), and advanced an objective theory of responsibility, based on the concept of risk. Although an unauthorized act of an official is not an act of State, States may be internationally responsible for *ultra vires* acts of officials committed while acting *en cette qualité*. Since States are free in international law to establish any form of internal organization, and divide the powers among their officials as they may please, they must also assume the liability for the risks arising from the operation of the internal organizations which they have established. The existence of this liability is supported by international practice and required by the necessities of international relations.[1]

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[1] Ibid., pp. 98–99. See also below, p. 104.

[2] Ibid., p. 100.

[3] Article 8 (2) (ibid., pp. 236–7) provided: 'International responsibility is . . . incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.' See also the proviso to this Article, below, p. 113.

[4] See Decencière-Ferrandière, *La Responsabilité internationale des états à raison des dommages subis par des étrangers* (1925), pp. 67–73; Pons, op. cit., pp. 170–82; Ago, loc. cit., pp. 459–76; Cohn, loc. cit., pp. 293–6; Starke, loc. cit., pp. 109–11; Strupp, 'Les Règles générales du droit de la paix', *Recueil des Cours*, 47 (1934) (i), p. 261, at pp. 560–1; Verdross, 'Règles générales du droit international de la paix', ibid. 30 (1929) (v), p. 275, at pp. 464–7; Van Hille, 'Étude sur la responsabilité internationale de l'état', *Revue de droit international et de législation comparée*, 10 (3^me^ série, 1929), p. 531, at p. 562; Cheng, op. cit., pp. 180–207; Briggs, op. cit., pp. 616–18. See, generally, Eagleton, op. cit., pp. 208–14. *Contra*, Borchard, *The Diplomatic Protection of Citizens Abroad* (2nd ed., 1922), pp. 185 et seq. See also above, p. 97.

Similarly de Visscher accepted the principle of objective responsibility based on a theory of risk.[2] He stressed that the responsibility of States for *ultra vires* acts of their officials is required by the necessity for security in international relations. Since States may regulate the division of power among their officials as they deem appropriate this security would become illusory if States could escape their responsibility by pleading the illegality of the injurious acts under their domestic laws. States must therefore be responsible for such an act of an official, as appears to be an 'acte de fonctions'.[3] Freeman, proceeding on his vicarious liability theory, agrees that States may be responsible 'once an agent has appeared to act in his official capacity'.[4] The vicarious liability theory is supported also by Oppenheim, who says that, although unauthorized acts are not acts of State, 'a State bears a wide, unlimited and unrestricted vicarious responsibility for such acts because its administrative officials . . . are under its disciplinary control', and because such acts 'are *prima facie* acts of the State'.[5] The idea that the justification for the responsibility is to be found in the State's 'exclusive territorial control' is stressed by Eagleton, who tends generally toward the theory of objective risk.[6] He argues that since the State 'puts the agent into a position which he may abuse; and since no other state may invade its territorial jurisdiction, it must accept responsibility for the protection of other states against its agents whether within their powers or not'.[7]

(*d*) *The criterion of apparent authority*

The foregoing examination of case law, of attempts at codification, and of the views of publicists indicates that a customary rule of international law has been established according to which States may be responsible for *ultra vires* acts of their officials committed within the scope of their apparent authority. This rule can be supported by analogy to common law rules of vicarious liability, where the question whether an act of an agent has been committed within the apparent scope of his authority is of relevance in determining whether a particular conduct falls within the agent's scope of employment.[1] Since the authority, actual or apparent, with which the State has vested its officials, has made the occurrence of the injurious act possible, it is just that States should be held internationally responsible for *ultra vires* acts of officials committed within their apparent authority.[2] A denial of this responsibility, which appears to be an objective one based on the theory of risk, would be disastrous to the security of international relations and the protection of citizens abroad. Since most acts of officials are committed within their apparent authority, the criterion of responsibility of States for acts committed within the apparent authority of their officials is of great importance. Nevertheless, this criterion is open to the following objections: First, it may be extremely difficult to define what is 'apparent authority', or 'cover of authority', and 'general authority'. Even the common law, despite its extensive case-law relating to such expressions in the field of vicarious liability, has not yet formulated unambiguous definitions capable of general application.[3] Secondly, the criterion of apparent authority alone, even if it were capable of a clear definition, may prove unable to provide aliens with adequate protection. If the official acts clearly outside his authority (and the alien must therefore be presumed to be aware of this), according to the criterion of apparent authority the State would not be responsible, even if the alien had no means of avoiding the injury.

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[1] Anzillotti, loc. cit., pp. 289 et seq. Compare with Triepel, *Völkerrecht und Landesrecht* (1899), pp. 324 et seq.

[2] Regarding the theory of allocation of risk and objective responsibility see also Dunn, *The Protection of Nationals, a Study in the Application of International Law* (1932), pp. 133–6; see below, p. 111.

[3] 'La Responsabilité internationale des états', in *Bibliotheca Visseriana*, 2 (1924), p. 89, at p. 92; see also above, p. 103; Van Hille, loc. cit.; Eagleton, op. cit., p. 210.

[4] Op. cit., pp. 24–25; see also above, p. 88, n. 1; 'Responsibility of States for Unlawful Acts of their Armed Forces', *Recueil des Cours*, 88 (1955) (ii), p. 267, at pp. 290–2.

[5] Op. cit. (8th ed., by Lauterpacht, 1955), p. 362.

[6] Eagleton, op. cit., pp. 213–14.

[7] Ibid., pp. 57–58.

§ 2. *Responsibility of States for acts committed outside of the apparent scope of authority of their officials: abuse of governmental means*

(*a*) *Introduction*

According to the criterion of apparent authority, therefore, a State is not responsible for an injury caused to an alien by an official abusing the means of his office in circumstances in which the alien, although aware of the apparent illegality of the injurious act, was unable to prevent it and thus avoid the damage. It would seem, however, that not only policy, but also international law, require that States should in fact be responsible in such circumstances. The type of case which it is proposed to consider here should be distinguished from two other types in which States may be responsible for unauthorized acts of officials, even if such acts were clearly illegal. The basis of the responsibility in all these situations may vary.

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[1] See above, p. 101, n. 1.

[2] Compare with the cases of *Uxbridge Permanent Benefit Building Society* v. *Pickard*, [1939] 2 K.B. 248, and *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, in which firms of solicitors were held vicariously liable for frauds committed against clients by the solicitors' clerks while acting within their apparent authority. The policy behind such cases may well be that the occurrence of the fraudulent act has been made possible by the apparent authority with which the master has clothed his servant. The public interest may require the master to be vicariously liable for acts committed by his servants acting within their apparent authority. See also Winfield, op. cit., p. 153.

[3] See above, p. 101, n. 1. It may be observed that international tribunals have not endeavoured to formulate general definitions of what is meant by 'apparent authority' and similar expressions. It may be suggested that in their *ad hoc* approach, international tribunals have displayed a more generous attitude to the injured aliens in the matter of whether a certain act has been committed within the scope of the official's authority than would common law courts in similar circumstances.

The first situation is that in which a State may be responsible for wrongful acts, even of an entirely private character, committed by its officials, if it has failed to exercise proper care and diligence in the prevention of such acts. A State may be responsible in such circumstances regardless of whether the officials have abused governmental means at their disposal. The leading case in this respect is that of *The Zafiro* (*Great Britain* v. *U.S.*, 1925)[1] in which the United States was held responsible for looting committed ashore by a crew of a naval vessel, on the ground that the crew was permitted to go ashore uncontrolled in an evacuated area in circumstances in which looting might have been expected. This responsibility, predicated on the control[2] which the ship's officers were bound to exercise over the crew, was not to be affected either by the fact that the crew ashore was unofficered,[3] or by the fact that no governmental means had been employed. The State is responsible primarily for the delinquency of the officials who failed to exercise proper care in the prevention of the injurious act, rather than for the delinquency of the officials who inflicted the actual injuries on the aliens.

The second situation is that in which the responsibility of the State is predicated on its failure to punish the wrong-doers, or when its conduct amounts to acquiescence in the *ultra vires* act. Thus, in the case of *Straughan* v. *United States*,[4] where it was argued that the acts of a British naval captain in forcibly stopping a United States frigate, searching her and removing from her an alleged deserter from the British Navy, were unauthorized, the Court ruled that 'all doubts of governmental responsibility . . . are removed by the fact that the British government received the prisoners . . . at first it refused to restore them, and, finally, only released them after five years of diplomatic negotiation'.[1] The responsibility of the State is predicated primarily on the delinquency of the officials who acquiesced in the *ultra vires* act, and only indirectly on the *ultra vires* act which caused the actual injury to the alien.

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[1] *Nielsen's Report*, p. 578; *R.I.A.A.*, vol. vi, p. 160; see also *Jeanneaud* (*France* v. *U.S.*, undated, decided under the Convention of 15 January 1880), Moore, *Arbitrations*, vol. iii, p. 3000, at p. 3001.

[2] The 'theory of control' may be regarded as a specific application to acts of soldiers of the general rule regarding the duty of States to exercise proper care and diligence in the prevention of illegal acts of governmental officials. Of course, States may be responsible also for failure to exercise due diligence in preventing illegal acts against aliens by private individuals; but in such cases the required standard of care may be lower. See also *Bellon* (*France* v. *Mexico*, 1929), *Annual Digest and Reports of Public International Law Cases, 1929–1930*, Case No. 104; *Diaz.* (*Panama* v. *U.S.*, 1933), U.S. Dept. of State Arbitration Series, No. 6, *American and Panamanian General Claims Arbitration, Report*, by B. L. Hunt (1934), p. 651; Oppenheim, op. cit. (8th ed., by Lauterpacht, 1955), pp. 362-3. Regarding responsibility of States for acts of the military see, generally, Freeman, loc. cit., pp. 267 et seq.

[3] Observe that Article 3 of the Hague Convention No. 4 of 18 October 1907, concerning the Laws and Customs of War on Land, recognized responsibility of a State 'for all acts committed by persons forming part of its armed forces'. Thus, it would appear that, at least in time of war, States may be responsible for unauthorized acts of soldiers, whether or not committed in the presence of officers. Regarding acts of unofficered soldiers see *Solis* (*U.S.* v. *Mexico*, 1928), *U.S.–Mexico, Opinions 1928–9*, p. 48, at pp. 53–54; *R.I.A.A.*, vol. iv, p. 358, at pp. 362–3; *Kling* (*U.S.* v. *Mexico*, 1930), *U.S.–Mexico, Opinions 1930*, p. 36, at pp. 39–43; *R.I.A.A.*, vol. iv, p. 575, at pp. 578–81.

[4] (1865), 1 Ct. Cl. 324.

(*b*) *Case law*

The situation to be considered here is one in which the responsibility of the State for an *ultra vires* act is predicated on the abuse of means which the State put at the official's disposal and which made the occurrence of the act possible. It is assumed, of course, that such responsibility exists only if the alien, notwithstanding the apparent illegality of the act, was unable to prevent it and thus avoid the damage. In contrast to the two situations previously discussed, here the responsibility is founded primarily on the *ultra vires* act which caused the actual injury to the alien. This proposition is well illustrated by the case of *Magee* (*Great Britain* v. *Guatemala*, 1874),[2] which involved the flogging of a British vice-consul at San-José, Guatemala, by the local military *commandante* and the soldiers under his command. Both the vice-consul and the Government of Guatemala tried in vain to prevent the clearly illegal acts of the *commandante*, which were motivated by personal animosity. The case having been taken up by Great Britain through diplomatic channels, Guatemala admitted its responsibility. The case of *The Panama Star and Herald and the La Estrella de Panama Co.* (*Ltd.*) (*U.S.* v. *Colombia*, 1899)[3] is also relevant. The publication of a newspaper owned by an American company was illegally and arbitrarily suspended by the Governor of Panama (which was then a part of the United States of Colombia), who was motivated by personal considerations. The President of Colombia ordered the Governor to reduce the period of suspension, but this was not done. Thus, the case involved the clearly illegal acts of the Governor, who abused the means put at the disposal of his office by the State. In its defence, Colombia argued that since the Governor exceeded his authority, only his personal responsibility

[1] Ibid., at p. 328. See also *Montano* (*Peru* v. *U.S.*, 1863), Moore, *Arbitrations*, vol. ii, p. 1630, at pp. 1635 et seq.

[2] *British and Foreign State Papers* [1873–4], pp. 875–922 (1881). See also *Donoughho* (*U.S.* v. *Mexico*, 1876), Moore, *Arbitrations*, vol. iii, p. 3012, which involved the responsibility of Mexico for acts of a rioting posse, which had been sent to arrest a person.

[3] *Foreign Relations* [1886], pp. 168–76 (1887), ibid. [1888], p. 423 (1889), ibid. [1890], pp. 260, 272–5 (1891), ibid. [1899], pp. 218–41 (1901). See also Whiteman, *Damages in International Law* (1943), vol. ii, pp. 889–91.

could be involved.[1] This argument of Colombia was rejected by the United States as not conforming to international law. After diplomatic negotiations Colombia admitted its responsibility.

In cases similar to that of *The Star and Herald* international tribunals are interested in the realities of the situation, rather than in the *de jure* division of powers among the officials of the State, and the legality of a certain act. This can be illustrated by the case of *Speyers* (*U.S.* v. *Mexico*)[2] which involved a seizure by the Mexican Government of certain goods, on the ground that they had been illegally imported into Matamoras. The importation of the goods conformed with the regulations promulgated by the commander of the Mexican forces in the area, which had been in force during the two years preceding the seizure. The Mexican Government contended that the commander had no power to issue import regulations, that the importation was therefore illegal, and the goods were subject to legitimate seizure. In this situation, assuming that the commander's lack of authority was apparent, an alien had no choice but to conform to the regulations which were enforced by military authority. Indeed, this position was taken also by umpire Lieber, who, in holding Mexico responsible for the seizure, argued that 'all that the law of nature and of nations says of *de facto* government' applied here and that 'nemo ad impossibilia obligatur'.[3]

One of the better-known cases involving abuse of governmental means to the injury of aliens is that of *Youmans* (*U.S.* v. *Mexico*, 1926).[4] Troops sent to protect a group of Americans who were being attacked by a mob in Mexico turned, instead, against the Americans who were killed as a result. When the question of responsibility was raised, Mexico, relying principally on the conclusions of the Guerrero Sub-committee of Experts, argued that the soldiers having exceeded their authority acted in their individual capacity and proceedings could be instituted only against them. The Commission regarded this defence as unacceptable. Mexico was to be responsible for the participation of its soldiers in the murder, which was committed while they were on duty. 'Soldiers inflicting . . . injuries . . . always act in disobedience of some rules laid down by superior authority', and were Mexican view accepted there 'could be no liability whatever for such misdeeds'.[5]

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[1] Colombia argued that it could be responsible only if certain conditions establishing its complicity with the illegal act of the Governor could be fulfilled. See ibid. [1896], p. 222 (1899). Compare with the conclusions of M. Guerrero's Sub-committee of Experts, above, p. 92.

[2] Undated, decided under the Convention of 4 July 1868, Moore, *Arbitrations*, vol. iii, p. 2868.

[3] Ibid., p. 2870.

[4] *U.S.–Mexico, Opinions 1926–7*, p. 150; *R.I.A.A.*, vol. iv, p. 110.

[5] Ibid., p. 116; *U.S.–Mexico, Opinions 1926–7*, pp. 158–9. The following cases arose out of the same incident and were similarly decided: *Connelly* (*U.S.* v. *Mexico*, 1926), *U.S.–Mexico, Opinions 1926–7*, p. 159; *R.I.A.A.*, vol. iv, p. 117; *Munroe* (*U.S.* v. *Mexico*, 1926), *U.S.-*

The Commission was also guided by the criterion of use of governmental means to the injury of aliens in the case of *Mallen* (*Mexico* v. *U.S.*, 1927),[1] which involved a maliciously motivated arrest of a Mexican Consul in El-Paso, Texas, by the local Deputy Constable, Franco, in the course of which the Consul was maltreated and wounded. Again, the question was whether the arrest was an unauthorized act of an official for which the United States was responsible or a private act, for which it was not so responsible. In holding the United States responsible, the Commission stated that 'both Governments consider Franco's acts as the acts of an official on duty . . . the evidence establishes his showing his badge to assert his official capacity. Franco could not have taken Mallen to jail if he had not been acting as a police officer'.[2] Thus, although there was little doubt about the illegality of Franco's conduct, the responsibility was predicated on the fact that the occurrence of the illegal act was made possible only through misuse of governmental means.

Another case in which a State was held responsible for an *ultra vires* act performed outside of the scope of an official's apparent authority and accomplished through abuse of governmental means is that of *Way* (*U.S.* v. *Mexico*, 1928).[3] A Mexican *Alcalde* (an inferior judicial officer), maliciously motivated, issued against an alien a warrant of arrest, which appeared to be void because it failed to state any charges. The enforcement of the warrant was entrusted to officers who were supplied with arms and ordered 'to use such means as may be suitable'. The alien resisted the clearly illegal arrest and was killed. The Commission held Mexico responsible for 'this . . . violation of personal rights secured by Mexican law and by international law'.[4]

Probably the most learned decision on this question is that of President Verzijl of the Mixed French–Mexican Claims Commission in *Caire* (*France* v. *Mexico*, 1929).[5] Caire, a French national, who had a boarding house in Mexico City was requested by one of his boarders, an army major, to

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Mexico, Opinions 1928–9, p. 314; *R.I.A.A.*, vol. iv, p. 538. For other cases in which States were held responsible for unauthorized acts of soldiers see *Jeannotat* (*Mexico* v. *U.S.*, 1875), Moore, *Arbitrations*, vol. iv, pp. 3673–4; *Falcon* (*U.S.* v. *Mexico*, 1926), *U.S.–Mexico, Opinions 1926–7*, p. 140; *R.I.A.A.*, vol. iv, p. 104; *Brignon* (*France* v. *Germany*, 1887), in *Revue de droit international et de législation comparée*, 20 (1888), p. 217; *The Panther* (*Brazil* v. *Germany*, 1906), *R.G.D.I.P.* 13 (1906), p. 200; *Garcia* (*Mexico* v. *U.S.*, 1926), *U.S.–Mexico, Opinions 1926–7*, p. 163; *R.I.A.A.*, vol. iv, p. 119; *Swinney* (*U.S.* v. *Mexico*, 1926), *U.S.–Mexico, Opinions 1926–7*, p. 131; *R.I.A.A.*, vol. iv, p. 98; *Stephens* (*U.S.* v. *Mexico*, 1927), *U.S.–Mexico, Opinions 1926–7*, p. 397; *R.I.A.A.*, vol. iv, p. 265.

[1] *U.S.–Mexico, Opinions 1926–7*, p. 254; *R.I.A.A.*, vol. iv, p. 173.

[2] Ibid., pp. 176–7; *U.S.–Mexico, Opinions 1926–7*, p. 259.

[3] *U.S.–Mexico, Opinions 1928–9*, p. 94; *R.I.A.A.*, vol. iv, p. 391.

[4] Ibid., pp. 400–1; *U.S.–Mexico, Opinions 1928–9*, p. 106. See also *Quintanilla* (*Mexico* v. *U.S.*, 1926), *U.S.–Mexico, Opinions 1926–7*, p. 136; *R.I.A.A.*, vol. iv, p. 101; *Kalklosch* (*U.S.* v. *Mexico*, 1928), ibid., p. 412; *U.S.–Mexico, Opinions 1928–9*, p. 126.

[5] *Jurisprudence de la Commission Franco-Mexicaine des Réclamations (1924–1932)* (1933), p. 207; *R.I.A.A.*, vol. v, p. 516.

procure a large sum of money. Having been unable to procure that sum, Caire was arrested by the major and a group of soldiers, taken to military barracks, threatened with death, and finally executed. Mexico argued in its defence that Caire's death was caused by acts of 'isolated soldiers' who acted without the knowledge and against the orders of their military superiors, for which it could not be responsible. The President rejected this defence of Mexico. He accepted as correct Anzilotti's conception of 'responsabilité objective'.[1] Although an unauthorized act could not be considered an act of State, nevertheless the necessities of international relations required that States be held internationally responsible for such acts.[2] International law has established two criteria for determining the unauthorized acts of officials for which States were responsible: 'il faut qu'ils aient agi au moins apparemment comme des fonctionnaires ou organes compétents, ou que, en agissant, ils aient usé de pouvoirs ou de moyens propres à leur qualité officielle.'[3] Thus, the President clearly recognized both the criterion of abuse of governmental means and that of apparent authority. Applying these general criteria to the facts in the *Caire* case, the President held Mexico responsible for the *ultra vires* acts of its military personnel, committed clearly outside their scope of authority through abuse of means put at their disposal by the State.[4]

This decision should not be narrowly construed as applying only to the acts of the military. For although it may be true that States are under a duty to exercise a higher degree of vigilance over their military than over their civilian personnel,[5] the criteria formulated by Verzijl are capable of general application.[6] States may be internationally responsible also for *ultra vires* acts of civilian officials committed through abuse of governmental means. Responsibility is determined by the character of the act, and the circumstances of the case, but not by the status of the official.

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[1] *R.I.A.A.*, vol. v, p. 529. See above, p. 103.

[2] The President relied in this respect on a statement by M. Bourquin, which was included in the Report submitted by M. Strisower to the Institute of International Law for its Lausanne Conference of 1927. See *Annuaire de l'Institut de Droit International*, 33 (1927) (i), p. 501, at pp. 507–8; *R.I.A.A.*, vol. v, p. 530. See Cheng's criticism of the decision, op. cit., pp. 204–7.

[3] The President accepted as a correct statement of modern international law the formula adopted by the Institute of International Law, at Lausanne, in 1927 (see below, p. 112), and rejected the Guerrero draft as wrong.

[4] *R.I.A.A.*, vol. v, p. 531.

[5] Ibid., pp. 528–9. It may well be that the characteristics distinguishing the military from the civilian personnel, and particularly the fact that the former are subject to constant discipline and control, and often are in possession of means which are inherently coercive and dangerous, would require a higher standard of care in the prevention of illegal acts by the military than by civilian personnel. In the case of *Réclamations Britanniques dans la Zone Espagnole du Maroc* (1925), Max Huber observed that 'l'État doit être considéré comme tenu à exercer une vigilance d'un ordre supérieur en vue de prévenir les délits commis, en violation de la discipline et de la loi militaires, par des personnes appartenant à l'armée. L'exigence de cette vigilance qualifiée n'est que le complément des pouvoirs du commandement et de la discipline de la hiérarchie militaire.' *R.I.A.A.*, vol. ii, p. 617, at p. 645. See also Freeman, loc. cit., p. 319.

[6] See *R.I.A.A.*, vol. v, pp. 529–30.

Another difficulty is that of defining the scope of the responsibility of States for *ultra vires* acts of officials, i.e. of determining where the clearly illegal *ultra vires* act of an official ends, and a private act of an individual who happens to be an official begins. Or, to put it in other terms, if both acts are considered to be of private rather than of official character,[1] the question is whether *ultra vires* acts of officials, for which States are responsible under customary international law, can be distinguished from other (private) acts of officials, for which States are not so responsible. Dunn, proceeding on his theory of 'allocation of risk',[2] argues that States must assume the liability for 'misuse of governmental power' by their officials, regardless of the latters' rank or status, and regardless of the motivation of the act, since such misuse is a 'delinquency of a type which, if permitted to occur generally, would make the conduct of customary social and business relations impossible'.[3] He correctly suggests a criterion based on the use of governmental means for the injuring of aliens: 'if an official uses his governmental power to commit an injury . . . then the question is to be dealt with as one involving the responsibility of the state for the acts of its officials. . . . All other cases are to be dealt with as if the wrongful act had been committed by a private individual.'[4]

A most interesting case in which a distinction was drawn between an *ultra vires* act of an official for which the State is responsible, and a private act of a person who happens to be an official, is that of *Mallen* (*U.S.* v. *Mexico*, 1927),[5] which arose from two maliciously motivated assaults made on the Mexican Consul in El-Paso, Texas, by the local Deputy Constable. In the course of the first assault, the Deputy Constable, having met the Consul in a street at night-time, slapped his face. This was considered to be 'a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official'.[6] The second assault occurred during an arrest and imprisonment of the Consul by the Deputy Constable who then availed himself of his official badge and pistol. This second attack was made possible only through abuse of governmental means, and was considered to be an illegal act of an official for which the United States was responsible. Another pertinent case is that of *Gordon* (*U.S.* v. *Mexico*, 1930),[7] which involved an accidental wounding of an American by a shot fired by one of two Mexican army doctors, who were practising target-shooting with a new pistol privately acquired by one of them. Mexican army regulations required daily target practice. In holding that Mexico was not responsible for the injury, the Commission appeared to have been guided by the criterion of use of governmental means. It stated 'that the target practice . . . was not that prescribed by Regulations, but of an absolutely different character instituted as the result of the private purchase of the . . . pistol. It is not known whether army doctors are required to perform target practice . . . the act in question was outside the line of service . . . and was a private act.'[1]

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[1] Under domestic law an unauthorized act of an official may be of entirely private character. However, for purposes of international responsibility it is irrelevant whether such an act be labelled as 'private' as long as the State has to answer for it under an established rule of customary international law. What is therefore of importance is not the label ('private' or 'official'), but a criterion whereby to distinguish between acts for which a State is, or is not, internationally responsible. Cf. Cheng, op. cit., pp. 199 et seq.

[2] Dunn, op. cit., pp. 133–4.

[3] Ibid.

[4] Ibid., pp. 135–6. See also Pons, op. cit., p. 181.

[5] *U.S.–Mexico, Opinions 1926–7*, p. 254; *R.I.A.A.*, vol. iv, p. 173; see also above, p. 109.

[6] *U.S.–Mexico, Opinions 1926–7*, p. 256; *R.I.A.A.*, vol. iv, pp. 174–5.

[7] Ibid., p. 586; *U.S.–Mexico, Opinions 1930–1*, p. 50.

(c) *Previous attempts at codification*

It will be recalled that the Committee of the Institute of International Law, of which M. Strisower was the *rapporteur*, suggested for the adoption by the Institute a formula based on the criterion of apparent authority.[2] However, the Institute in its Lausanne Conference of 1927 adopted a broader formula, which incorporated both the criterion of the apparent authority and that of the use of governmental means. It provided that States were to be responsible for unauthorized acts of organs acting 'en se couvrant de leur qualité d'organes de l'État, et en se servant des moyens mis, à ce titre, à leur disposition . . .'.[3] In the *Caire* case this formula was considered to reflect correctly the position in modern international law.[4]

Another proposal favouring the acceptance of the criterion of governmental means was made in 1929 by the Government of Belgium, which, in reply to the request for information included in Point V, No. 2 (*b*),[5] stated that: 'The State is responsible if an official has used the means at his disposal as an organ of the State.'[6] Similar proposals were made also in the discussions preceding the adoption of Basis No. 13 during the Seventh and Eighth Meetings of the Third Committee of the League of Nations Conference for the Codification of International Law. The representative of Switzerland, Mr. Dinichert, emphasized that the criterion of apparent authority in Basis No. 13 was inadequate for purposes of international protection, unless assumption was made that, in view of the obvious illegality of the act, the alien was able, by reasonable means, to prevent the official's abuse of authority and thus avoid the damage.[1] For the same reasons, the representative of South Africa, Mr. Lansdown, proposed to adopt a formula broader than that in Basis No. 13, which would incorporate both the criterion of the apparent authority, and that of the use of governmental means.[2] It may well be that Mr. Dinichert's views influenced the final formula adopted in Article 8 (2) of the Draft Convention approved by the Third Committee. The first part of that Article stated that States are responsible for unauthorized acts of officials 'performed under cover of their official character',[3] whereas the proviso introduced a criterion which is in harmony with that of use of governmental means. It stated that: 'International responsibility is, however, not incurred . . . if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage.'[4] This would imply that even if an alien was aware of an official's apparent lack of authority, but could not avoid the damage caused him by abuse of governmental means, the State must be responsible.

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[1] *U.S.–Mexico, Opinions 1930–1*, p. 52; *R.I.A.A.*, vol. iv, pp. 587–8. In an interesting dissenting opinion, Commissioner Nielsen, relying on the *Youmans* and particularly on *The Zafiro* cases, argued that Mexico should be responsible because of 'the element of control which . . . the government was obliged to exercise', *R.I.A.A.*, vol. iv, p. 591; *U.S.–Mexico, Opinions 1930–1*, p. 56. For a clear example of a private act of a person who happens to be an official see the case of *Morton* (*U.S.* v. *Mexico*, 1929), *U.S.–Mexico, Opinions 1928–9*, p. 151, *R.I.A.A.*, vol. iv, p. 428, which involved the murder in a *cantina* of an alien by an intoxicated and off-duty Mexican army colonel. See also *Castelain* (*France* v. *Mexico*, undated, decided under the Convention of 15 January 1880), Moore, *Arbitrations*, vol. iii, p. 2999.

[2] See above, p. 99.

[3] *Annuaire de l'Institut de Droit International*, 33 (1927) (iii), pp. 330–1; *American Journal of International Law*, 22 (1928), Supp., p. 330.

[4] See above, p. 110.

[5] See above, p. 101.

[6] Conference for the Codification of International Law, *Bases of Discussion*, vol. iii, L.N. Pub. 1929. V. 3, p. 75.

IV

CONCLUSIONS

The foregoing examination of the various sources of international law supports the following conclusions:

Regardless of what the position in their domestic law may be, States are internationally responsible for the following *ultra vires* acts committed by their officials:

1. An act committed within the scope of the official's apparent authority.

2. An act committed outside the scope of the official's apparent authority, if the commission of the act was made possible through means put at the official's disposal by the State. However, a State is not responsible if the alien could, in consequence of the apparent lack of authority of the official, avoid the damage.

These two criteria for the determination of responsibility supplement each other. The first criterion is probably the more important, since most *ultra vires* acts are committed within the officials' apparent scope of authority. However, this criterion—which may be supported also by analogy with vicarious liability rules in common law—is by itself inadequate, since protection of aliens requires that States be held responsible also for *ultra vires* acts coming under the second criterion.

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[1] Conference for the Codification of International Law, *Acts*, vol. iv, L.N. Pub. 1930. V. 17, pp. 94–95.

[2] Ibid., pp. 85–86.

[3] See above, p. 103.

[4] Conference for the Codification of International Law, *Acts*, vol. iv, L.N. Pub. 1930. V. 17, pp. 236–7.

Admittedly, the two criteria suggested here are rather general, difficulties may arise in their actual application, and many relevant questions have been left unanswered. But the present stage of the development of international jurisprudence would not warrant a more definite formulation and it is hoped that, general and indefinite as these criteria may be, they may yet provide some basis for the satisfactory solution of cases. Although the theory of State responsibility in general, as distinct from its responsibility for *ultra vires* acts, has not been discussed, it may perhaps be suggested that recent tendencies seem to favour the theory of liability based on objective risk, rather than on fault. This development is paralleled by tendencies in domestic laws, and particularly in the French law regarding governmental liability.

The needs of adequate international protection of aliens and interest in the security of international relations require that States be internationally responsible for *ultra vires* acts which fall within the above suggested criteria. These criteria reflect a broader proposition that international law looks to the *de facto* exercise of governmental powers of the State, rather than to the *de jure* division of powers within it. It is just and necessary that, in so far as aliens are concerned, States assume liability for *ultra vires* acts of their officials for, after all, the commission of these acts has been made possible by the apparent authority with which States have vested the officials and by the governmental means which States have conferred on them. States, having thus placed their officials in the position to act, legally or illegally, must be made to answer for such acts as international law considers to have been committed in the violation of its standards.

CUSTOMARY INTERNATIONAL LAW AND ACQUIESCENCE

By I. C. MACGIBBON, M.A., LL.B.

Lecturer in Public Law in the University of Aberdeen

It is intended in this article to indicate the part played by acquiescence[1] in the growth of rules of customary international law. Some general remarks on the process of formation of international custom must be made; but no thoroughly documented analysis of the matter is attempted in view of the limited scope of the study. The emphasis rests on the relevance of acquiescence. However, the aspects of the doctrine of acquiescence to which reference is made may do much to explain the interrelation of the various elements in the concept of international custom.

The contents of this article are arranged under the following headings: I. Acquiescence as an element in the development of customary rights and obligations—(*a*) The process of formation of international custom; (*b*) General customary rights and obligations; (*c*) Features common to the development of customary, historic and prescriptive rights; (*d*) The enhanced value of acquiescence as a result of the historic or prescriptive character of special or exceptional customary rights; (*e*) The effect of protest on the formation of international custom: II. The *opinio juris sive necessitatis*: III. The basis of the binding force of rules of customary international law; Objections to the consensual theory of custom: IV. The tests applied by writers and tribunals to determine the validity of customary rules—(*a*) Opinions of writers; (*b*) Judicial and arbitral decisions: V. Conclusions.

I. *Acquiescence as an element in the development of customary rights and obligations*

(*a*) *The process of formation of international custom.* The voluminous literature on the subject contains few descriptions of the process of formation of international custom as convincing as that outlined by Professor McDougal in a study of one particular aspect of the international law of the sea.[2] It illustrates both the complexity and the flexibility of the method of law making by custom; and it is noticeably free from reliance upon the familiar concepts of the elements of custom.

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[1] The notion of acquiescence and the limitations on the doctrine have been discussed by the writer in this *Year Book*, 31 (1954), pp. 143 et seq.

[2] 'The Hydrogen Bomb Tests and the International Law of the Sea', in *American Journal of International Law*, 49 (1955), pp. 356 et seq.

> 'From the perspective of realistic description' [Professor McDougal wrote] 'the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them.'[1]

Pointing out that the decision-makers to whom he had referred include 'not merely judges of international courts and other international officials, but also those same nation-state officials who on other occasions are themselves claimants', Professor McDougal commented:

> 'This duality of function . . . or fact that the same nation-state officials are alternatively, in a process of reciprocal interaction, both claimants and external decision-makers passing upon the claims of others need not, however, cause confusion: it merely reflects the present lack of specialization and centralization of policy functions in international law generally.'[2]

This description of the forces at work in the formation of the law in a particular sphere is—for the most part[3]—valid in relation to customary international law as a whole; and it may usefully be elaborated in order to clarify the function of acquiescence in the development of an international custom.[4] Two preliminary observations must be made. In the first place, generalizations concerning the process by which rules of customary international law are formed do not always acknowledge that a rule may be expressed in terms either of a right or of an obligation and that it may involve both the protection of the right in question and the acknowledgement of the correlative duty.[5] Considerations which apply to a rule expressed as a right or as a liberty may well be inappropriate to a rule expressed as a duty or as a prohibition.[6] In the second place, customary rules of general (or, as it is sometimes said, universal) application must be distinguished from special or exceptional customs whose sphere of validity is limited and in which the passage of time is a more directly relevant factor.[1]

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[1] 'The Hydrogen Bomb Tests and the International Law of the Sea', in *American Journal of International Law*, 49 (1955), pp. 356–7.

[2] Ibid., pp. 357–8.

[3] But see below, pp. 133–4.

[4] As has been stated above, a thorough examination of the phenomenon of international custom is outside the scope of this study. The literature is extensive. Apart from textbooks, the matter is discussed in numerous articles and monographs, to some of which reference is made below. For a bibliography see Oppenheim, *International Law*, vol. 1 (8th ed., by Lauterpacht, 1955), p. 25, n. 1.

[5] It may be deduced from the principle of the freedom of the seas, for example, first, that every State in time of peace has the right to use the high seas for navigation, fishing and other purposes, and second, that no State may interfere with the vessels of other States exercising that right.

[6] It is suggested below that failure to make this distinction is responsible for much of the confusion surrounding the concept of the *opinio juris sive necessitatis*.

(*b*) *General customary rights and obligations.*[2] As Sir Gerald Fitzmaurice has pointed out, there may be some artificiality in stressing the element of consent in general rules of customary law based on the common practice of States. He argued that 'it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.'[3] Similar considerations apply, it was added, whether the rule governed a topic until then unregulated by international law, or whether the rule emerged as a change in existing law. According to this formulation, the binding force of the rule is traced directly to consent, and the artificiality extends only to the form in which that consent is manifested. As with all types of customary rules, the process of formation is similar, namely, the assertion of a right, on the one hand, and consent to or acquiescence in that assertion, on the other. In the case of a general customary right, that is one which is exercised by the generality of States, the presumption of general consent or acquiescence is more strongly raised by virtue of the fact of general participation in the practice, than would be the case with regard to an exceptional customary right exercised by a single State or by a small group of States.

The fact of general participation in a practice which is recurrent and more or less uniform[4] at least serves to indicate that the practice is not illegal. The practice may have been adopted and perpetuated for the reason that it was convenient and appeared to be in the interests of the States participating in it. At this stage it may be described as a usage. To transform the usage into a 'general practice accepted as law'—to use the words of Article 38 (1) (*b*) of the Statute of the International Court of Justice—that is into an international custom, the practice must be followed on the basis of a claim of right and, in turn, submitted to as a matter of obligation. Once the stage is reached at which a State pursues the practice as of right and at the same time submits to its exercise as of right by other States, and the generality of States do likewise, the usage has become an international custom involving both a right and an obligation, practised in the certain expectation of reciprocity, and grounded, on the one hand, in the common practice of States and manifesting, on the other hand, their common consent, either express or in the form of acquiescence.

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[1] See below, pp. 120 et seq.

[2] The development of special and exceptional customary rights and obligations is discussed below, pp. 121 et seq.

[3] See this *Year Book*, 30 (1953), p. 68.

[4] The considerations prompting the growth of such a practice may approximate to some or all of the sociological or, at least, non-legal factors which are commonly adduced as explaining the binding nature of rules of customary international law. As far as new rules of international law are concerned, it is not believed that extra-legal factors do more than account for the propensity of States to pursue one given practice rather than another. They may account for the growth of a usage, or a rule of comity: they do not explain how it may become a customary rule.

The relevance of neither protest nor acquiescence is altogether obvious, yet both are of potential significance. To determine whether a given practice is being pursued as a matter of right or merely as a matter of convenience may be a task of some difficulty which, however, evidence of either protest or absence of protest may to some extent resolve. In so far as protests are made against refusal to submit to the practice or against aberrations in which the practice takes a substantially different form, they tend strongly if not conclusively to show the conviction on the part of the protesting States that they were acting in defence of their rights, or, in other words, that the practice was being asserted on the basis of a claim of right. On the other hand, acquiescence in refusals to submit to a given practice, or acquiescence in a contrary practice on the part of other States, affords cogent evidence that the practice is not followed on the basis of a claim of right and that submission to its exercise is not regarded as obligatory—in short, that it is not an international custom. Thus, Judge Lauterpacht, commenting on the view that foreign States enjoyed jurisdictional immunity by virtue of a customary rule of international law, pointed out that 'it is a fact that the courts of a considerable majority of states have departed from that assumed rule of international law, at least to the extent of exercising jurisdiction over foreign states in matters *jure gestionis*, without, as a rule, giving occasion for protest on the part of the foreign states concerned'.[1] 'Accordingly,' he submitted, 'in so far as the actual practice of states may be said to be evidence of customary international law, there is no doubt that the principle of absolute immunity forms no part of international law.'[1] Similar reasoning lay behind the refusal of the Court in the *Lotus* case to recognize the existence of the prohibitive rule for which the French Government contended.[2]

The process of action and reaction which Professor McDougal observed as characteristic of the development of a particular set of customary rules is common to the formation of all rules of customary international law. The fact that claims may conflict to a greater or less degree lends complication to the process of determining what part, if any, of differing claims and

[1] This *Year Book*, 28 (1951), p. 221. And see ibid., p. 227.

[2] *P.C.I.J.* (1927), Series A, No. 9, p. 29. See also ibid., p. 23. And see O'Connell, in *American Journal of International Law*, 49 (1955), p. 188. Although insisting that it was profitless to attempt to determine the validity of Australian continental-shelf legislation by reference to the question of protest or absence of protest, he pointed out that one of the factors which militated against Australia asserting a proprietary interest in specific pearl beds in reliance on evidence of a century of continuous Australian exploitation was the indisputable fact that the pearl beds had been worked, without formal protest, by Malay and Indonesian divers from time immemorial and by Japanese divers at least since 1935.

practices in respect of a particular matter have crystallized into customary practices with legal sanction. It is probable that only by reference to protest and acquiescence can this question be resolved. Those parts of conflicting claims and practices in respect of a particular matter which are common to all of the claimant States and have encountered no protests are, it is submitted, the acceptable *residuum* of the practice or claim which is apt to attain the status of custom; by contrast, protests maintained against certain parts of the claim suffice to prevent those objectionable features from achieving legal sanction.[1] Finally, it is submitted that the extent to which a general uniform practice has been 'accepted as law'[2] may most readily and objectively be gauged by estimating the degree of general consent, or, failing express consent, the degree of general acquiescence which the practice has encountered.

(*c*) *Features common to the development of customary, historic and prescriptive rights.* Although, as one authority put it, 'customary international law is not yet another expression for prescription',[3] nevertheless historic, prescriptive and customary rights share a common process of development which involves, on the one hand, the constant assertion of the right in question and, on the other hand, consent or acquiescence in that assertion on the part of the affected States. As in historic and prescriptive rights so in customary rights the two elements are complementary and mutually interdependent.[4] The similarities in the process of development of customary and prescriptive rights were noted by Sir Gerald Fitzmaurice in these words:

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[1] To simplify the matter somewhat, it may be said that, with regard to claims to the 'continental shelf', for example, two different types of claim have emerged from the State practice. Whereas those claims which have followed the pattern set by the United States proclamation have reserved to other States the continued right to freedom of navigation on the superjacent waters, and have not encountered protests, some Latin-American claims have embraced an area similar to that envisaged by the United States claims, but have made the further claim to exercise sovereignty over the superjacent waters. In so far as the Latin-American claims have approximated to the United States type of claim, no protest has been directed against them; and it may be argued that the features common to both types of claim, having met acquiescence and indeed imitation on the part of other States, are on the way to becoming, if they are not already, part of customary international law. In so far as the further claims to sovereignty over the superjacent waters have met with persistent protests from other States, that feature of the claims is thereby prevented from becoming part of customary international law.

[2] The meaning of Article 38 (1) (*b*) of the Statute of the International Court of Justice is not altogether clear. As Professor Hudson pointed out, the Court cannot apply a custom: *The Permanent Court of International Justice, 1920–1942* (1943), p. 609. What can be applied is a rule expressive of the Court's satisfaction, on the evidence, that a practice exists which is general, followed as of right and submitted to, by the States affected by it, as a matter of obligation. The fact that the practice has been accepted as law, that is, accepted as being in conformity with law, presupposes that the exercise of the practice is, in the view of States submitting to it, a matter of right, with the result that there has developed a rule with binding force. As Judge Lauterpacht wrote: 'Unilateral declarations by traditionally law-abiding states, within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other states, may properly be regarded as providing such proof of conformity with law as is both creative of custom and constituting evidence of it.' See this *Year Book*, 27 (1950), p. 395.

[3] Judge Lauterpacht, in this *Year Book*, 27 (1950), p. 393.

[4] See Sørensen, *Les Sources du droit international* (1946), p. 101: 'Ce qui caractérise cependant

> 'Both depend on the establishment of a practice or usage—one general and the other particular—and each derives its eventual legal sanction from some form of consent on the part of States—either general acceptance in the one case, and in the other specific recognition or tacit acquiescence. Apart from any difference in the time factor, the *method* (practice and assent) is the same both for the establishment of new customary law and for the acquisition of prescriptive or historic rights.'[1]

The passage of a considerable period of time is an essential element in the growth of prescriptive and historic rights, the presumption of general or particular acceptance which may be raised by absence of protest being strengthened in proportion to the length of time silence persists. In the formation of rules of general customary law, although the passage of time is seldom emphasized as a decisive factor, the nature of the case suggests that some considerable time may elapse between the initiation of a usage, its growth into a general practice, and its final acceptance as law. The circumstance that a given usage may not merit the description 'immemorial' does not bar its eventual growth—if it satisfies other conditions—into an international custom.[2] The Judgments and Advisory Opinions of the Permanent Court of International Justice provide no exact criterion with regard to the length of time which must pass before a usage becomes a custom. Indeed, as Sørensen has indicated, the Court did not isolate this aspect of custom from a consideration of the degree of generality of participation in the practice in question.[3] Hackworth put the matter thus: 'Customary . . . international law is based upon the common consent of nations extending over a period of time of sufficient duration to cause it to become crystallized into a rule of conduct.'[4] A similar test has been

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cette catégorie de règles [sur la répartition des compétences entre les membres de la communauté internationale] c'est que l'acte positif d'un Etat et l'abstention ou la tolérance de l'autre se complètent, de sorte qu'il est sans importance pour l'établissement de la coutume de les considérer séparément.'

[1] This *Year Book*, 30 (1953), p. 31, n. 3. And see ibid., p. 39, where Sir Gerald states that 'it must be remembered that the acquisition of a historic right by prescriptive means is merely a special case of the creation of right by custom or usage, similar in principle to the creation of a general rule of law by those means'.

[2] But see, to the contrary, the Dissenting Opinion of Judge Negulesco concerning the *European Commission of the Danube* (*P.C.I.J.* (1927), Series B, No. 14, pp. 84 et seq., at p. 105).

[3] See Sørensen, op. cit., p. 102, where he wrote that: 'c'est un trait caractéristique de la jurisprudence de la Cour [Permanente de Justice Internationale] que l'élément de temps ou de durée n'est pas considéré indépendamment de la généralité de la pratique en question. L'envergure et l'ancienneté de la pratique semblent se fondre en une unité, de sorte que la pratique suivie par une grande majorité d'Etats suffit pour la création d'une coutume, même d'origine assez récente; d'un autre côté, une pratique de grande ancienneté n'a peut-être pas besoin d'autant d'adhérents.'

[4] *Digest of International Law*, vol. 1 (1940), p. 1. Professor H. A. Smith, drawing attention to the increasing importance of custom and practice, commented: 'Nothing can be done to bring the law into accordance with the needs of the time unless important governments are prepared to assume the initiative and to take the action which some new situation demands. It is certain that the steps taken will provoke criticism and opposition, for they are bound to affect

suggested elsewhere[1] for determining the length of time necessary for a prescriptive title to mature.

Both Judge Lauterpacht[2] and Sir Gerald Fitzmaurice[3] have suggested that the period of time necessary for an international custom to take form may be comparatively short: at the same time, however, they indicated the circumstances in which a prolonged period of gestation might be requisite. 'Any tendency to exact a prolonged period for the crystallization of custom', Judge Lauterpacht wrote, 'must be proportionate to the degree and the intensity of the change that it purports, or is asserted, to effect.'[4] Sir Gerald Fitzmaurice, on the other hand, agreeing that a new rule of customary law could be formed quickly, added that

> 'the acquisition of prescriptive rights by individual States, contrary to the existing (and otherwise still subsisting) international order, involves different considerations and criteria, that make the passage of time, and of an appreciable time at that, essential at any rate in all those cases (which are the type of the true prescriptive or historic claim) where the positive consent or express recognition of States cannot be shown.'[5]

The considerations which emphasize the importance of both the time factor and the doctrine of acquiescence with regard to special or exceptional customary rights are examined in the following section.

(*d*) *The enhanced value of acquiescence as a result of the historic or prescriptive character of special or exceptional customary rights.* If a broad classification of customary rights is undertaken it will be appreciated that apart from the type of general customary rights discussed above there are in addition certain special or exceptional customary rights akin to either historic or prescriptive rights. It is suggested that it is largely in respect of

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the immediate interests of other states, and for this reason much time may elapse during which there will be controversy and uncertainty, but there is no other method to which we can look for the development of the law.' See *The Crisis in the Law of Nations* (1947), pp. 48–49. See also ibid., p. 51.

[1] See the writer's remarks in this *Year Book*, 31 (1954), pp. 166–7.

[2] Loc. cit., 27 (1950), p. 393: 'A "consistent and uniform usage practised by the States in question"—to use the language of the International Court of Justice in the *Asylum* case—can be packed within a short space of years. The "evidence of a general practice accepted as law"—in the words of Article 38 of the Statute—need not be spread over decades.'

[3] Loc. cit., 30 (1953), p. 31: 'A new rule of customary law based on the practice of States can in fact emerge very quickly, and even almost suddenly, if new circumstances have arisen that imperatively call for legal regulation—though the time factor is never wholly irrelevant'.

[4] Loc. cit., 27 (1950), p. 393. In other words the argument appears to be, as Judge Lauterpacht goes on to imply, that a practice which has merely the appearance of novelty, without in fact departing appreciably from the accepted rules on the matter in question, will in a short space of time win general acceptance. The crystallization of the practice as a custom will be hastened if the States which are most influential in the sphere to which the practice relates all participate in it. On the other hand, a practice which is clearly contrary to the rules accepted theretofore is open to protests based on the established customary law, and it depends for its ultimate validity on the fact that the States affected by the practice have acquiesced in it, that is, have shown by their failure to protest against it that they have accepted it as lawful.

[5] Loc. cit., 30 (1953), p. 31.

those customary rights which share the characteristics of either historic or prescriptive rights that acquiescence has particular relevance.

In discussing the consensual element in custom and usage, Sir Gerald Fitzmaurice indicated that there are three classes of customary rights to be considered.

> 'It seems necessary' [he wrote] 'to distinguish three cases: 1. Where a *general* rule of customary law is built up by the common practice of States, although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often the uncoordinated, independent, if similar, action of States), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law. It makes no substantial difference whether the new rule emerges in regard to (in effect) a new topic on which international law has hitherto been silent, or as a change in existing law. . . . 2. Where a special right different from, and in principle contrary to, the ordinary rule of law applicable, is built up by a particular State or States through a process of prescription—leading to the emergence of a usage or customary or historic right in favour of such State or States . . . the element of consent, that is to say, acquiescence with full knowledge, on the part of other States is not only present, but necessary to the formation of the right. 3. Special rights, i.e. such as would not exist under ordinary law, may, however, be acquired by one State, not as against the world in general (as under 2), but against another particular State, e.g. in its territory or waters or with reference to its vessels or nationals. . . . While the element of consent may be more difficult to detect here, and may have been lacking at the origin of the matter, it is believed that if the right has developed into a legal right, this is because consent, in the form of acquiescence, was given or can be presumed.'[1]

This is weighty support for the requirement of a consensual basis for rules of customary international law.

The special or exceptional rights comprised within the second and third of the above categories differ from each other precisely in the respects in which historic rights differ from prescriptive rights, that is as regards the number of States affected by the exercise of the respective rights. The second category of customary rights, valid *erga omnes*, are rights established as exceptions to the general rule of law applicable: they derogate from rights held in common by the generality of States. The Scandinavian claim to a four-mile belt of territorial waters is an example of a claim to a customary right of an historic nature. The third category of rights are rights established as against single States or, more rarely, groups of States of limited numbers: and whether or not they form exceptions to the general rule of law applicable in the particular matter, they are valid only as against those single States or groups of States of limited numbers. The rights in respect of its nationals for which the United States contended in the case concerning *Rights of United States Nationals in Morocco*[2] are examples of customary rights of this prescriptive nature.[1] An indication of the possession of common features by the various categories of rights is provided by the manner in which the concepts of prescription, customary right and historic right overlap in the second category. Two interrelated factors distinguish the second and third categories of exceptional and special customary rights from the class of general customary rights; and these factors also explain why customary rights of an historic or prescriptive character depend conspicuously upon the doctrine of acquiescence for their eventual sanction as rules of law.[2] In the first place they are, or were in origin, apparently or in actual fact, essentially adverse rights. In the second place, they are *ex hypothesi* deprived of the benefit accruing to rights which the generality of States exercise: in place of the fact of general participation which raises strongly the presumption of consent with regard to general customary rights, special and exceptional customary rights are validated entirely by the consent or acquiescence of the States affected by the practice in question manifested in relation to the passage of a comparatively prolonged period of time.[3]

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[1] This *Year Book*, 30 (1953), pp. 68–69.

[2] *I.C.J. Reports*, 1952, pp. 199 et seq.

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[1] The Advisory Opinion delivered by the Permanent Court of International Justice concerning the *European Commission of the Danube* may also be cited. The League of Nations Committee of Enquiry found that the geographical scope of the powers exercised by the Commission before 1914 had gradually exceeded those envisaged by the Treaty of London of 1883. Upholding the findings of the Committee of Enquiry, the Court declared that the extension was attributable to the development of a 'usage having juridical force simply because it has grown up and been consistently applied with the unanimous consent of all the States concerned' including the acquiescence, tacit but none the less formal, of the Roumanian delegates who represented the territorial sovereign on the Commission. See *P.C.I.J.* (1927), Series B, No. 14, p. 17. Again, in the Advisory Opinion concerning *The Free City of Danzig and the International Labour Organisation*, the Permanent Court of International Justice, in the words of Sørensen (op. cit., p. 104), 's'est appuyée sur une telle coutume particulière pour déterminer la compétence du Gouvernement polonais relative à la conduite des affaires extérieures de Danzig'. The Court noted that 'a practice which seems now to be well understood by both Parties, has gradually emerged from the decisions of the High Commissioner and from the subsequent understanding and agreements arrived at between the Parties under the auspices of the League'. *P.C.I.J.* (1930), Series B, No. 18, pp. 12–13.

[2] See the Dissenting Opinion of Judge Altamira in the *Lotus* case (*P.C.I.J.* (1927), Series A, No. 10, p. 97), where, after evaluating the effect of municipal legislation in relation to the formation of customary law, he said: 'It is of particular interest to ascertain whether,—in cases where it has been sought, contrary to a general principle of international law not established by convention or custom, to impose such legislation in concrete form upon other States,—the attempt, whether simply intended or actually carried out, has encountered consent or protest on the part of the consensus of opinion in the country affected.' And see the Dissenting Opinion of Judge Loder in the same case, ibid., pp. 34–35. One of the trends in the history of the freedom of the sea to which Judge Lauterpacht drew attention in his study of sovereignty over submarine areas was the 'phenomenon of unilateral action, apparently or actually in conflict with the principle of the freedom of the seas'. This *Year Book*, 27 (1950), pp. 405–6. The reasonable nature of the encroachments on the principle of the freedom of the seas, in conjunction with the absence of persistent protests, led him to conclude that, within certain limits, 'the conception of the contiguous zone is now in the stage of approximation to a customary rule of international law.' Ibid., p. 406.

[3] Compare, however, the views expressed by Dr. O'Connell, who, while admitting that 'absence of protest is very relevant as a test of the value of unilateral acts', asserted that 'it is not necessary to found a rule of law.' *American Journal of International Law*, 49 (1955), p. 194, n. 51.

(*e*) *The effect of protest on the formation of international custom.* In view of the common factors shared by the processes of formation of customary and prescriptive rights, it is not surprising that the diplomatic protest, as well as the phenomenon of acquiescence, may play a significant part in determining the existence or otherwise of a rule of customary international law. Although the role of protest may be more obvious with respect to the formation of those customary rules which approximate most closely to prescriptive rules, it may, none the less, constitute a determinant in the growth of even those rules whose basis in consent may be said to be a superfluous or highly artificial consideration. The contents of protests may, and frequently do, indicate the view of the law on the matters in question entertained by the protesting States:[1] to this extent they may afford evidence of the acceptance of a practice as law. On the other hand, to carry a stage further the remarks of the majority of the Permanent Court of International Justice in the *Lotus* case,[2] if protests are made against conduct based on the purported exercise of a right such protests will serve to invalidate the contention that the practice in question is accepted as law: or, to put it in another way, they will effectively deny the existence of an *opinio juris*, where that element is relevant, with regard to the obligation to submit to the exercise of the supposed right on the part of the protesting States. Again, protests based on a rule of customary international law and directed against a State or States pursuing a course of conduct incompatible with that rule will prevent the conduct protested against from developing into a customary right;[3] and they will also afford evidence of the acceptance as law by the protesting States of the rule on which their protests are based. The effect of protests on the development of rules of customary international law is thus not unlike their effect on the formation of historic and prescriptive rules.[4] Sørensen, in his valuable study on the sources of inter-

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He concluded: 'Absence of protest is . . . of only relative value in determining whether or not a rule of law has evolved.' Loc. cit., p. 194.

[1] See, for example, Lissitzyn, 'The Treatment of Aerial Intruders in Recent Practice and International Law', in *American Journal of International Law*, 47 (1953), pp. 559 et seq., especially at pp. 569 et seq. where much of the law involved has been derived from the contents of diplomatic protests. And see Sørensen, op. cit., p. 103: 'Pourtant, la protestation accomplit . . . une mission qui est au fond différente de celle des autres actes pertinents pour la constitution de l'élément matériel de la coutume. Elle entre en ligne de compte, non comme acte produisant certains effets dans le monde extérieur, mais comme déclaration de volonté, à cause de son contenu intellectuel. Elle se rapporte ainsi à l'élément psychologique de la coutume. . . .'

[2] *P.C.I.J.* (1927), Series A, No. 10, p. 29.

[3] Sørensen, after outlining the consideration which the Permanent Court of International Justice gave to the possible effect of protest in the circumstances of the *Lotus* case, stated: 'En dernière analyse, la protestation assumerait donc dans cette éventualité la fonction de contrecarrer une déviation occasionnelle de la pratique générale, d'en effacer les effets préjudiciables à l'établissement de la coutume et de devenir, peut-être, indirectement un des éléments constitutifs de celle-ci.' Op. cit., p. 103.

[4] See the writer's observations in this *Year Book*, 30 (1953), pp. 307 et seq. See also Fitzmaurice, ibid., pp. 28–29, 42–44, and in 32 (1955–6), p. 33.

national law, drew attention to the general nature of the terminology adopted by the Permanent Court of International Justice in relation to customary international law,[1] and particularly to the use by the Court of the word 'constant' to describe the type of practice which might ground an international custom; and he observed: 'Le mot "constant" . . . implique sans doute, en dehors de la répétition, la notion d'une suite non interrompue.'[2] The adoption of an inconsistent practice would obviously suffice to deny to either of the conflicting practices the constant quality required;[3] and Sørensen concluded that courts would thus have a good deal of discretion in deciding whether a given practice measured up to the necessary standard. It is to obviate this difficulty that the concepts of protest and acquiescence may prove of the greatest utility, and Sørensen indicated the extent to which proof of protest might effectively clarify the position—as, it may be added, to the opposite effect would proof of absence of protest, that is, acquiescence. He wrote: 'Il est vrai pourtant, que dans bien des cas la question ne soulève aucun doute sérieux. La forme la plus claire sous laquelle cette interruption puisse se manifester, c'est la protestation expresse de la part d'un Etat contre la conduite d'un autre.'[4]

II. *The* opinio juris sive necessitatis

Article 38 (1) (*b*) of the Statute of the International Court of Justice provides little warrant for the meaning which is most often attributed to this troublesome element of international custom. Although the *opinio juris* is, to quote Professor Briggs, 'one of the psychological elements which has created more difficulties in theory than in practice',[5] the difficulties created in theory have been formidable. Much of the confusion appears to have stemmed from the tendency to discuss rules of customary international law as if they were invariably expressed in terms of an obligation. As has been suggested above, rules of customary international law may be expressive of protection for an international right at the same time as they acknowledge an international obligation.[6] Whereas the binding force of a customary obligation may properly be attributed to the *opinio juris* as defined subsequently, the part which that concept plays in the acquisition of customary rights is largely indirect and probably limited, and its place is taken in this context by the doctrine of acquiescence. The *opinio juris* is, of course, relevant to the formation of customary rights, but only from the standpoint of the States affected by the exercise of the right in question, and then only if those States become bound to adopt some positive course of action under the correlative obligation in order to permit of the exercise of the right.

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[1] Op. cit., p. 102: 'Elle [la Cour] parle de "pratique constante", "pratique quasi universelle", "pratique constante et générale", "tradition constante", etc.'

[2] Op. cit. 'Non-interruption' is, of course, a requirement of prescription.

[3] Note, for example, the words of the International Court of Justice in the *Asylum* case between Colombia and Peru: *I.C.J. Reports*, 1950, p. 277: 'The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.'

[4] Op. cit., p. 103.

[5] *American Journal of International Law*, 45 (1951), p. 730: and see authorities cited there.

[6] The ambivalence of the concept of a customary rule is clearly indicated in the Judgment of

Some writers have formulated the elements of an international custom so as to include both the *opinio juris* and the notion of acquiescence. Professor Hudson, for example, wrote: 'The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time.'[1] This passage is not free from difficulty. It must be noted, first, that failure to protest against the conviction that the practice was enjoined by law is not the equivalent of acquiescence in the practice itself. The relevance of the latter to customary obligations and its relation to the *opinio juris* are discussed below. Moreover, it is difficult to imagine any situation in which protests are likely to be directed against a State fulfilling an obligation under the conviction that it is bound to do so, since the protesting State in such circumstances would be either one of the States asserting the right with regard to which the State to which the protest is directed is evincing its belief that it is under an obligation to submit, or a State which the practice in question does not affect. In a Working Paper[2] on Article 24 of the Statute of the International Law Commission, while including again the element of the 'conception that the practice is required

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the International Court of Justice in the *Asylum* case between Colombia and Peru. The Court stated: 'The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as Law"'. *I.C.J. Reports*, 1950, pp. 276–7. In a later passage the Court noted that Colombia had failed to show that the rule for which she contended had been 'exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent upon them'. Ibid., p. 277.

[1] *The Permanent Court of International Justice, 1920–1942* (1943), p. 609.

[2] U.N. Document A/CN. 4/16 (3 March 1950), p. 5. There Professor Hudson stated that 'the emergence of a principle or rule of customary international law would seem to require presence of the following elements: (*a*) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (*b*) continuation or repetition of the practice over a considerable period of time; (*c*) conception that the practice is required by, or consistent with, prevailing international law; and (*d*) general acquiescence in the practice by other States.'

by, or consistent with, prevailing international law', Professor Hudson amended the formulation requiring absence of protest against the conviction that the practice was enjoined by law by stipulating 'general acquiescence in the practice by other States'. Since this formulation appears to contemplate both customary obligations and customary rights, clarification is still necessary to avoid the impression that acquiescence is equally relevant in both the situations envisaged. On the one hand, the 'conception that the practice is required by . . . prevailing international law' seems appropriate only to a nascent customary obligation: and in that context recourse to 'general acquiescence in the [nascent obligatory] practice by other States' is highly artificial in view of the consideration that the 'other States' are either States exercising the correlative right, in which case their acquiescence may safely be presumed, or States which are in no way involved. On the other hand, while the 'conception that the practice is . . . consistent with prevailing international law' is not necessarily shared by all the participants in a nascent customary right,[1] that conception, where it exists, and the notion of 'general acquiescence in the practice by other States' are properly limited in application to practices which take the form of assertions of alleged rights.

In 1937 Kopelmanas pointed out that

> 'almost all the doctrine on the subject is limited to the statement that international custom results from similar and repeated acts by States—repeated with the conscious conviction of the parties that they are acting in conformity with law. Thus there would be two factors in the formation of custom: (1) a material fact—the repetition of similar acts by States, and (2) a psychological element usually called the *opinio juris sive necessitatis*—the feeling on the part of the States that in acting as they act they are fulfilling a legal obligation.'[2]

If the process of development of a customary rule is considered from the standpoint of the assertion of a claim and the pursuance of a particular line of conduct in practice, rather than from the standpoint of the imposition of a duty, the relevance of the doctrine of acquiescence is increased while that of the *opinio juris* is diminished. The reasons prompting a State or States to pursue a particular course of conduct may vary from convenience to self-interest. It is only with difficulty that it can be conceived that a practice motivated by reasons of convenience or self-interest would have been initiated or evolved under the conviction on the part of the States participating that such a practice was in conformity with law, far less that it was enjoined by law, although such considerations may well apply to the formation of a customary obligation. To hold otherwise would be to suppose that the assertion of a claim, far from being made as of right or in a state of indifference as to whether or not it was in conformity with law, was made as a matter of duty. Indeed, Kopelmanas, who stated that there were good reasons to doubt whether international custom arose only from an activity exercised under the impression that it was required by law,[1] convincingly argued that the requirement that the practice in question must have been followed in the conviction that it was in conformity with law or enjoined by law had played no part in the development either of customary international principles deducible from treaties,[2] or of the practices of international organizations beyond the limits warranted by their constitutional provisions,[3] or of the rules with regard to the minimum rights of aliens,[4] or the rules protecting certain forms of credit specially adaptable for international banking transactions.[5] He concluded 'that the formation of custom does not depend on the presence in the minds of the parties of an *opinio juris*'.[6] Such a view is not contradicted by the jurisprudence of the Permanent Court of International Justice. It has been pointed out that, apart from the opinions of three individual judges (Judges Nyholm and Altamira in the *Lotus* case, and Judge Negulesco in the Advisory Opinion concerning the *European Commission of the Danube*), the Court only once—in the *Lotus* case—emphasized the psychological element of custom, and then only in the negative sense that its absence precluded the existence of a customary rule. In other cases in which it was concerned with the application of rules of customary international law, no mention was made of the *opinio juris*, and the Court was satisfied—as other courts have been—with proof of a constant general practice in the matter in question.[1]

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[1] See, for example, the views of Kopelmanas, discussed below, p. 128.

[2] This *Year Book*, 18 (1937), p. 129. See also Kelsen, *Principles of International Law* (1952), p. 307; Brierly, *The Law of Nations* (5th ed., 1955), pp. 60–61; Briggs, *The Law of Nations* (2nd ed., 1952), p. 47; Kunz, in *American Journal of International Law*, 47 (1953), p. 667; Sørensen, op. cit., pp. 105 et seq.

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[1] Loc. cit., p. 130.

[2] With regard to these principles Kopelmanas argued that 'it must be admitted that here we cannot derive any criterion from the mental attitude to law of the customary international agents. No *opinio juris* governs the birth of this class of customary rules. When agents of a State sign a treaty, they do not [invariably?] intend to obey existing law. They are making new law. The principles deducible from a group of similar treaties are influenced by reasons of legal policy.' Ibid., p. 137.

[3] Noting that, in spite of the fact that the Universal Postal Convention prescribed that the validity of the acts of the Postal Congress should depend on their ratification by the members, the practice of the Congress was to take decisions by majority, and that decisions were immediately applicable, dissenting States being faced with the choice either of accepting or of leaving the Union, Kopelmanas commented: 'The advance on the usual limitations on the powers of international organs is in this case very real; it has been made by an effective practice of the organ itself, that is by a procedure of a customary nature. . . . No trace is to be found of any feeling on the part of those concerned that they were acting in conformity with law.' Ibid., p. 139. With regard to the interpretation given by the Council of the League of Nations to Article XI of the Covenant, which he stated constituted the positive law although clearly contrary to the intentions of the authors of the Covenant, Kopelmanas observed: 'It is indisputable that the formation of this minimizing custom has been carried into effect by nothing except the constant attitude of the Council of the League of Nations. The proceeding in question contained no psychological element. The Council could not have believed that it was applying faithfully the law in force. Its action was determined only by the weakness inherent in the present condition of the international community, that is to say by reasons of social order.' Ibid., p. 140.

[4] 'The rules as to the condition of foreigners,' Kopelmanas argued, 'have been formed in virtue of the similar provisions of national legislations by which there has been elaborated an international custom containing a minimum standard in relation to foreigners. . . . It is true that no *opinio juris* of the parties interested is discoverable. When the individual legislator lays down a rule relating to the condition of foreigners he certainly does not think he is executing an international obligation. His action is influenced by considerations of expediency and especially by the idea that the minimum of rights allowed to the foreigner is indispensable to the security of international relations.' Ibid., p. 148.

[5] With regard to these practices Kopelmanas asserted: 'It is clear that here there is no feeling for law. The parties concerned know perfectly well that what they do is not covered by law. Indeed they often go against positive law.' Ibid., p. 150.

[6] Ibid., p. 151. See also Kelsen, 'Théorie du droit international coutumier', in *Revue Internationale de la théorie du droit* (1939), pp. 253 et seq., at p. 263.

Although the *opinio juris* scarcely fulfils the function commonly attributed to it as an essential element in the formation of all customary rules, its relevance is most marked with respect to the development of customary obligations of a particular type, namely, those which involve not merely passive acquiescence in the exercise of a right, but the taking of positive steps to secure its implementation.[2] Even with respect to customary obligations, however, there seems to be little need for the concept of an *opinio juris* as it is generally interpreted. It does nothing to clarify the meaning of the words 'accepted as law' in Article 38 (1) (*b*) of the Statute of the International Court of Justice. Nor can it properly be applied to a custom expressed in terms of the exercise of a right. The phrase 'accepted as law', however, may admit of interpretation in senses which more accurately reflect the actual processes of evolution from practice or usage to custom, whether viewed from the standpoint of the exercise of rights or that of the performance of obligations. Some examples of the application of the test of acceptance as law may be suggested. Thus, a new practice in a sphere unregulated by international law may be considered as a custom once it has been accepted as not unlawful: or a practice of apparent but not actual novelty may be considered as a custom once it is accepted as being in conformity with prevailing law: again, a practice, although unlawful in its inception, may be considered as a custom once it is accepted as having been validated by consent, express or in the form of acquiescence. The foregoing interpretations probably provide a frame of reference for most practices which take the form of the assertion and enforcement of a claim on the basis of a right or alleged right. On the other hand, a practice may involve the performance of an obligation rather than the exercise of a right: it may consist either in simple tolerance with regard to the conduct of other States which are enforcing a claim on the basis of a right or pretended right, or in a course of positive action if a claim is such that it calls for complementary submission by way of positive performance on the part of the State or States against which it is directed. These practices, followed apparently as a matter of obligation or nascent obligation, may be said to become definitive customary obligations once they have been accepted as being required by law.

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[1] See Sørensen, op. cit., pp. 109–110. At p. 110 he noted: 'Chose remarquable, d'ailleurs, ni la Cour, ni les juges dissidents ne se sont jamais intéressés à l'élément psychologique pour affirmer l'existence d'une coutume. La pratique générale et constante leur a suffi pour conclure qu'une règle coutumière avait été créée et pouvait servir de base de leurs décisions. On a recouru à l'élément psychologique seulement dans le sens negatif que son absence a empeché l'affirmation d'une règle coutumière.' And see below, pp. 132, 141 et seq.

[2] See below, p. 130.

The following explanation is offered, with some diffidence, concerning the place of the *opinio juris* in the development of a customary obligation. In the early stages of the development of a customary right other States are faced with the choice of objecting or remaining passive. From their inaction the inference of consent in and acceptance of the validity of the claim may be drawn; and this inference may be strengthened by the passage of time, the growth in the number of States participating in the claim and the extent to which the claim is enforced. So far, the conduct of States other than participants in the claim and practice may amount to but not exceed voluntary acquiescence, and this may remain the position while the possibility of simple passivity is open to them. However, at the same time as the right is developing its correlative duty is developing. In the nature of the case, the right claimed may be such that its fulfilment may continue to require no more than passive submission on the part of other States. If that is so, the validity of the claim—its acceptance as law—may be gauged solely by reference to the continued acquiescence of other States. The absence of protest may be simply explained by the awareness of the acquiescent States that, since the claim in question was not unlawful, no proper ground for protest existed. On the other hand, once the correlative duty involves for its implementation a course of positive action, as opposed to simple tolerance, then the *opinio juris* may become an essential element in the absence of which that course of action cannot become endowed with the binding force of a customary obligation. If the practice continues with uniformity and is asserted as of right, and if the States assuming the obligation share the conviction that the action taken to give effect to the obligation is enjoined by law, the latter course of action has at that stage ripened into a definitive customary obligation.

The *opinio juris* in these circumstances is thus, to some degree, distinct from acquiescence; but it is no more than the logical—although not necessarily inevitable—consequence of the acquiescence or implied consent which, it may be argued, would have permitted the right correlative to the obligation to be perfected in any event.[1] Thus, it may equally well be

[1] As far as the writer is aware, only Professor Scelle has without qualification equated the *opinio juris sive necessitatis* with consent. He wrote: 'Le second élément *essentiel* de la coutume

asserted that all that is required is that the claim and practice should be followed as of right and should be submitted to without protest, in other words, should be exercised as rightful and accepted as lawful. Acceptance of a course of conduct as lawful seems necessarily to involve the further otiose conviction that participants in the course of conduct are entitled to act as they are doing; and this in turn appears to leave little alternative to submission in the belief that submission is obligatory. However, in the case of a customary obligation expressed in terms of a prohibition, that is, where a rule emphasizes that States shall refrain from pursuing a certain course of action, it is not unreasonable that emphasis should be placed on the *opinio juris* rather than on acquiescence.[1] Although even in this case the binding character of the rule may as validly be ascribed to acquiescence as to the *opinio juris*, yet, since recognition of the lawfulness of the enforcement of the correlative claim may be derived from the acquiescence of States submitting to the prohibition, such recognition may be thought to be completely unambiguous if it can also be shown that compliance was and is rooted in consciousness of an obligation to comply.

III. *The basis of the binding force of rules of customary international law*

It is perhaps surprising that, in spite of the consistency with which judicial opinion has found the eventual legal sanction of customary rules in consent in one form or another,[2] and notwithstanding the tendency of many writers to ascribe to the same source the binding force of particular customary rules,[3] there should persist among publicists a pronounced

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est d'ordre psychologique: c'est le *consensus* ou *l'opinio necessitatis*, c'est-à-dire le faiseeau des consentements individuels prêts à reconnaître et à subir la règle de Droit ainsi découverte et extériorisée.' *Droit international public* (1944), p. 398. Other writers have broached the problem without pursuing its implications. Thus Sørensen, with regard to the Advisory Opinion concerning the *European Commission of the Danube*, wrote: 'Ce qui, à notre avis, permet de considérer comme coutumière la réglementation ainsi démontrée, c'est l'accentuation par la Cour de la durée et de la continuité de la pratique en question. Si la Cour estime nécessaire d'insister sur cet élément et ne se contente pas de dégager l'accord tacite d'actes isolés, il nous paraît le mieux approprié de placer la règle ainsi révélée dans la catégorie des règles coutumières. Le consentement des intéressés, que la Cour a pris soin de mettre en épingle, se rapporte, de ce point de vue, à l'élément psychologique de la coutume. . . .' Op. cit., p. 104. See also Séfériadès, in *Revue général de droit international public* (1936), p. 144.

[1] Perhaps the clearest illustration of this point was furnished by the Judgment of the Permanent Court of International Justice in the *Lotus* case. With regard to the French contention that a rule of international law had crystallized which was specially applicable to collision cases, whereby a State other than the flag-State was prohibited from exercising jurisdiction over any occurrence on board a ship on the high seas, the Court was not satisfied merely with proof 'that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as bound to do so'. The Court insisted that 'only if such abstentions were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom'. *P.C.I.J.* (1927), Series A, No. 10, p. 28.

[2] See below, pp. 141 et seq.

[3] See below, pp. 138 et seq. And see Sørensen, op. cit., p. 87: 'La conception de la coutume comme un traité tacite garde une tradition très forte dans la doctrine du droit international et est toujours soutenue par beaucoup d'auteurs.'

measure of disagreement as to the factor which is decisive in transforming an international usage without binding force into an international custom. Attention has been drawn to the essentially voluntarist or consensual approach to customary international law taken by the Permanent Court of International Justice.[1] The attitude of the Court was illustrated by one of its rare pronouncements on an abstract question in the well-known passage in the Judgment of the majority in the *Lotus* case, where it was stated that 'rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . .'.[2] The weight of the authority of the judicial and arbitral decisions examined hereafter appears in fact to place a considerable burden on those publicists who seek the binding force of customary international law elsewhere than in the consent, express or in the form of acquiescence, of the States participating in or affected by the practice in question. This jurisprudence, it is submitted, makes it clear that customary rights become entitled to the protection of international law and customary duties become endowed with obligatory force in the last resort only by virtue of consent.[3] That consent may be express; it may be implied from the conduct of States, as when they *prima facie* recognize the legality of a practice by participating in it (although in these circumstances acquiescence may also be required when those States in turn submit to the exercise of the practice); or it may take the form of acquiescence. These are but other manifestations of the acceptance of the practice as law.[4]

The sources to which writers who have disagreed with the consensual theory of custom have turned to discover the decisive test of the validity of customary rules are various. Different tests have been suggested at different times. Social necessity was invoked by Kopelmanas. '[The] formation and existence of a custom', he wrote, 'depend on its conformity with the social needs of a legal order. The custom results from acts of the same character because those who do them cannot do otherwise. The nature of the legal relationship to be regulated requires a certain definite attitude.' He concluded: 'This allows us to assert that whenever the facts themselves impose a certain conduct on subjects of law we have a customary rule.'[1] In his discussion of the *opinio juris* Sørensen drew attention to the requirement stipulated by some writers that, before a usage could become a custom, the practice in question must be followed in the conviction that it responded to the dictates of social necessity. Of reciprocity, which—or the expectation of which—probably lies at the root of most rules of both comity and custom, Sørensen noted: 'Si le besoin de réciprocité est considéré comme élément de la "nécessité sociale" — et les réalités des rapports internationaux semblent imposer une telle conclusion — cette notion paraît mal appropriée à servir de critère entre la coutume juridique et les actes de courtoisie et de simples usages sans caractère obligatoire.'[2] This criticism, it is submitted, may be applied to all tests which ignore the factor of consent.

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[1] See, for example, Sørensen, op. cit., p. 88: 'Si . . . nous examinons la position prise par la Cour, nous verrons que les théories voluntaristes dominent les raisonnements abstraits de la Cour.' Sørensen added, however, by way of qualification that: 'Les décisions de la Cour portent l'empreinte des circonstances particulières aux cas individuels, sans qu'elle ait tenu à les ranger dans un système théorique impeccable.'

[2] *P.C.I.J.* (1927), Series A, No. 10, p. 18. See also the Dissenting Opinions of Judges Nyholm (ibid., pp. 59–60) and Altamira (ibid., p. 96).

[3] Under the heading of 'The true sense in which the consent of States to a rule of international law is necessary', Sir Gerald Fitzmaurice wrote: 'The general consent of States may be a source of rules of international law, and such consent may be necessary before a rule can be said to be accepted as such.' Loc. cit., p. 26. In a later passage he emphasized the necessity for consent with regard to special and exceptional customs. Ibid., pp. 68–69.

[4] The formula 'accepted as law', sanctioned by its place in Article 38 of the Statute of the International Court of Justice, or an equivalent form of words, has been frequently used by courts in explaining the binding force of customary rules. In its Judgment in the *Lotus* case the Permanent Court of International Justice described the 'usages' expressive of rules of law binding upon States as 'generally accepted as expressing principles of law'. *P.C.I.J.* (1927), Series A, No. 10, p. 18. See also the Dissenting Opinions of Judges Klaestad, Read and Guggenheim in the *Nottebohm* case, in *I.C.J. Reports*, 1955, pp. 30, 41, 55. Many similar expressions are found in the decisions of municipal courts. Thus, in the case of the *West Rand Central Gold Mining Company* v. *The King*, [1905] 2 K.B. 391, the Court stated: 'Any doctrine [of international law] so invoked must be one *really accepted as binding between nations*' (italics added). And the Supreme Court of Poland in *Trade Delegation of U.S.S.R.* v. *Maurycy Fajans* in 1928 referred to 'the general principle of the so-called law of nations, based on customs which are *accepted in the relations between States*' (italics added). *Annual Digest, 1927–1928*, Case No. 108.

The test which was put forward with particular forcefulness by Professor McDougal was that of the reasonableness of the practice in question.[3] He asserted: 'What is most relevant in prior prescriptions from the regime of the high seas, and can be applied without irrational extrapolation to this new problem of the hydrogen bomb tests, is simply the test of *reasonableness*—the test by which the decision-makers of the world community have in modern times adjudicated all controversies involving conflicts between claims to navigation and fishing and other claims.'[4] In an earlier passage Professor McDougal stated: 'For all types of controversies the one test that decision-makers have in fact invoked and applied is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and variables in context, is reasonable between the parties'.[5]

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[1] This *Year Book*, 18 (1937), p. 148. And see Scelle, *Droit international public* (1944), p. 399: 'Le Droit commun international coutumier s'applique [à tous les Etats] par le seul fait qu'ils évoluent juridiquement dans le milieu social où il est en vigueur.' Compare Kelsen, *Principles of International Law* (1952), p. 314: 'The binding force of customary international law rests in the last resort on a fundamental assumption: on the assumption that international custom is a law-creating fact.' Again, Professor H. A. Smith stated that 'consent is the legislative process of international law, though it is not the source of legal obligation. A rule once established by consent (which need not be universal) is binding because it has become a part of the general law'. *Great Britain and the Law of Nations*, vol. i (1932), p. 13.

[2] Op. cit., pp. 106–7.

[3] And see Kopelmanas: 'Sometimes it is merely the satisfactory and reasonable character of the custom which allows a decision whether a particular rule has or has not the character of a legal rule.' Loc. cit., p. 151.

[4] *American Journal of International Law*, 49 (1955), p. 361.

[5] Ibid., p. 359.

Although claims may be made and may be accepted because they are reasonable, it is going too far to say that they are held valid or decided in every case on grounds of reasonableness; and it is suggested below that there are good grounds for rejecting this as the sole conclusive test. In a cautious appraisal of the state of the law with regard to the conception of contiguous zones, Judge Lauterpacht employed the test of reasonableness initially, but he linked it, significantly, with the consideration that there had been no persistent protests against claims based upon that conception before concluding that it was 'in the stage of approximation to a customary rule of international law.'[1] To put it in another way, the decision-makers entitled to apply the test of reasonableness are the intermediate decision-makers, the State officials, and not the final arbiters, the tribunal which ultimately sets the seal of legality on a disputed practice. It is, indeed, difficult to accept the propriety of resort by the judges of the International Court of Justice to what seems tantamount to considerations *ex aequo et bono*, since it is clear from the second paragraph of Article 38 of the Statute of the Court that such considerations are within the purview of the international judge only 'if the parties agree thereto', an eventuality which has yet to materialize. Professor McDougal described the Judgment in the *Fisheries* case (*United Kingdom* v. *Norway*) as an 'excellent example of [the] process by which external decision-makers appraise international claims', stating that the Court, by drawing on a great variety of considerations, had declared lawful Norway's claims, 'which', he added, 'could not be justified by reference to either explicit agreement or widely accepted custom, and which had been protested by other nation states'.[2] However, this is to underestimate seriously the weight attributed to the factor of consent, and to ignore the Court's reference to the toleration of the international community and to the absence of protest on the part of the United Kingdom in particular.[3]

It is suggested, however, that these and other essentially non-consensual tests[4] may more properly be considered merely as starting-points, that is, as circumstances which generate particular practices, and no doubt predispose States to consent or acquiesce, rather than as final decisive tests of the legal validity of the customary rule in question. While it can hardly be controverted that, in general, a reasonable rule or claim will meet with acquiescence and an unreasonable one with protest,[1] the test of reasonableness, *per se*, can explain only the genesis of a rule but not why it should have acquired binding force. It may be objected further that tests such as 'reasonableness' or social or economic necessity carry with them the disadvantages attaching to possible subjectivity in application. Perhaps a more important objection is that which springs from the uncertainty as to the state of the law which may be the result of a multiplicity of varied interpretations by decision-makers, from State officials to tribunals, basing themselves on the same vague standards. The fact that an international tribunal may have exceptionally, and without the prior agreement of the parties, rendered a decision based apparently on considerations *ex aequo et bono*, ought to be matter for regret and not for subsequent imitation at all levels. The desirability of encouraging a movement towards the universal acceptance of the compulsory jurisdiction of the International Court of Justice in all legal disputes, or at least of promoting respect for the judicial and arbitral function generally in international law, is scarcely to be called in question by international lawyers. Neither of these objects is served well by the adoption of standards which allow the merits of flexibility to reduce to insignificance the psychologically desirable factor of predictability—especially in a system as centrifugal as international law at its present stage of development.

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[1] This *Year Book*, 27 (1950), p. 406.

[2] Loc. cit., p. 359.

[3] See, for example, *I.C.J. Reports*, 1951, pp. 138–9.

[4] It is as difficult to condone the jettisoning of a consensual test which Dr. O'Connell advocated in his justification of the proposition that the 'continental shelf' is a concept of law as it is to accept the validity of the test or tests which he invoked in place of consent. He wrote: 'Precedent is only a test of the pattern in question, and hence it may be unilateral without inhibiting the growth of law. When it is observed that over twenty nations have asserted the competence to extend sovereignty over their continental shelves, and when, further, it is recalled that these include the major Powers with a preponderant interest in both the freedom of the seas and the protection of coastal resources, it is legitimate to assert, without further analysis of consensus, that the continental shelf is a concept of law. The fact that it has not yet been contained within precise limits nor formulated in unambiguous terms is a reflection on the deficiencies of analytical positivism rather than upon the reality of the concept.' Tribunals may not readily find an 'adequate basis for their decisions' in a concept of law with so unpredictable a content. Dr. O'Connell added: 'In short, then, economic necessity is the generating impulse of the doctrine, and contiguity is relied on as

(*a*) *Objections to the consensual theory of custom.* The main obstacles in the way of acceptance of the consensual theory of customary international law are of long standing, but they do not lack contemporary support. One has been posed briefly by Dr. O'Connell. Dismissing absence of protest as of no more than relative value in determining whether or not a rule of law

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the test of its validity. . . . The only appropriate test of the continental shelf, therefore, is that of *ipso jure* subjection to the littoral state.' *American Journal of International Law*, 49 (1955), pp. 194–5.

[1] Lord Salvesen, in a concurring opinion in the case of *Mortensen* v. *Peters* (1906) 8 F (J) 93, drew attention to the fact that acquiescence was a probable consequence of the adoption of a reasonable rule by the coastal State in the matter in question. He said: 'We were told that the result of upholding the conviction would be to provide reprisals by other powers. If so, that is matter for the Foreign Office. But it is difficult to suppose that foreign nations should object to a regulation designed for the protection of fisheries in which they all share, and which confers no exclusive privileges on British subjects' (pp. 108–9). The Queen's Advocate reported to a similar effect in 1868 on the general question of the limits of Spanish maritime jurisdiction. He observed: 'Nations have been accustomed to concede to one another a certain exercise of police over merchant ships on the high seas beyond the limit of a marine league from their coast, with a view to prevent illicit trade; and when the municipal regulations of a State are in such matters reasonable, and its police is enforced with fairness and equity, foreign nations have acquiesced in its exercise.' *Report of the Queen's Advocate to Lord Stanley*, 17 March 1868: Spain.

had evolved, he remarked that 'if the consensual theory were pressed to its logical conclusion, it would be difficult to discover more than a few rules of international law.'[1] However, neither the substance nor the sphere of application of a surprisingly large number of so-called 'established rules' of customary international law is free from some measure of doubt: and one authority has suggested a number of important questions with regard to which it is difficult to decide whether a new norm has been established or merely a tendency thereto.[2]

More recently, somewhat similar misgivings have been expressed by Charles De Visscher in the course of an appraisal of the prospects of international adjudication.[3] Observing that 'the contribution of the judge is itself a function of the state of the law',[4] he drew attention to the 'poverty' of custom as a source of law, and pointed out that a minimum of stability is a prerequisite for the growth of custom which cannot take place when State practice is equivocal and contradictory and fails to crystallize in 'a general practice accepted as law'. With reference to the unsystematic growth of State practice in new fields, he concluded: 'It cannot be denied that the traditional development of custom is ill suited to the present pace of international relations.'[5] Whether such a conclusion is warranted or not depends on the view taken of the elements of an international custom and the role it plays. To enable customary rules to provide courts 'with an adequate basis for their decisions, which can be adapted to the diverse facts in question',[6] Judge De Visscher was apparently prepared to countenance a distortion of the process of formation of an international custom by invoking only the flexibility of that process and by abandoning the criteria provided in Article 38 (1) (*b*) of the Statute of the International Court of Justice.[7] 'The consent theory,' he noted, 'which purports to base custom on tacit agreement between States, leads to a different and necessarily more static concept of the role of custom.'[8] It may be admitted that insistence on a consensual basis for custom does act as a check on the rapid development of customary rules: but while it preserves safeguards which may be necessary to the maintenance of order it by no means stultifies the development of those rules. Their principal feature should be that they reflect the accepted practice of States.[1] Within that context the flexibility of their process of formation allows alteration in the content of international customs in order to meet the changed practices of States in the face of new, and it may be, urgent needs. But that flexibility is not, and ought not to be, limitless. New international customs are the creatures of their own conditions of creation: they develop only as soon as changing State practice has developed to the point where it has become general and accepted as law. To ignore either of those limiting factors is to sacrifice stability and to divorce international custom from the practice of the entities which create it.

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[1] *American Journal of International Law*, 49 (1955), p. 194.

[2] See Kunz, ibid. 47 (1953), p. 668.

[3] 'Reflections on the Present Prospects of International Adjudication' (translated from the French by Eleanor H. Finch), ibid. 50 (1956), pp. 467 et seq., at pp. 472–3.

[4] Ibid., p. 472. It is not clear whether this means that the judge is free to 'legislate' when the law on a matter before him is undeveloped or confused, or that the judge is limited in the rules which he can apply to rules of generally acknowledged validity, including the principle that, in the absence of rules on a given matter, a State enjoys freedom of action.

[5] Ibid.

[6] See the Judgment in the *Fisheries* case, *I.C.J. Reports*, 1951, p. 133.

[7] He wrote: 'The customary rule is a source of living law only insofar as, by adhering to the flexibility of its own process, it is capable of providing courts "with an adequate basis for their decisions, which can be adapted to the diverse facts in question". Far from denoting a disintegration of the law, these adaptations, as long as they are inspired by the realities of international practice and become operative under the control of the judge, are proofs of the progress of the law.' Loc. cit., p. 473.

[8] Ibid., n. 11.

Another objection, on a different plane, lies in the apparent fact that, as Professor Kelsen put it, 'general international law is binding upon many states which never, expressly or tacitly, consented to it.'[2] States are bound, that is to say, by rules of international law which were formed before they became members of the community of States. In the words of Professor Kelsen: 'The states are bound by general international law without and even against their will. . . . It may be assumed that international law becomes applicable to a newly established community when the latter is recognized as a state by other states.'[3] These and similar objections, which are limited in their application to the case of the relationship of newly recognized States to the pre-existing body of international law, are partly irrelevant and have been criticized as such.[4] The contention that existing rules of international law are binding upon newly recognized States independently of their consent[5] does not exclude the propriety of insisting on a consensual basis for the formation of new customary rules.

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[1] In allaying criticisms of the Judgment in the *Fisheries* case, Judge De Visscher did not allude to a passage of the Judgment which would be relevant whether the rules which the Court envisaged were regarded as general or exceptional rules. At p. 138 the Court said: 'From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.'

[2] *Principles of International Law* (1952), p. 316. And see ibid., p. 312: 'Since general international law is customary law and since it is binding upon all States of the international community, it would—according to the theory that custom is a tacit consent—be necessary to prove that all the States of the international community have consented to all the norms of general international law by their actual conduct, by participation in the establishment of the custom which evidences the law.' Professor Kelsen insisted that the assumption that international law was recognized by all States was a fiction. See also ibid., pp. 432 et seq. And see, to the same effect, Scelle, *Droit international public* (1944), p. 399; and Sørensen, op. cit., p. 87.

[3] Op. cit. (1953), p. 154. See also Corbett, *Law and Society in the Relations of States* (1951), pp. 68–69, 73–74.

[4] The consent of States plays a part in the formation only of new principles of international law and, as Judge Lauterpacht pointed out, 'has no reference to the question of subjection to *existing* law'. *The Function of Law in the International Community*, pp. 419 et seq.

[5] It may possibly be argued that an application for statehood ought to be viewed as necessarily implying consent on the part of the applicant to be bound by the rules in force between States rather than as a request to be recognized as, to some extent, an outlaw. However, as Corbett pointed out (op. cit., p. 69), 'controversy still rages over this point, as over so many others.'

Consent once given with regard to a new custom cannot be revoked at will by individual States,[1] but the development of a customary rule may be interrupted if consent is refused.[2]

IV. *The test applied by writers and tribunals to determine the validity of customary rules*

Not only municipal and international tribunals, but many writers also have eschewed an elaborate approach in their search for the legal basis of the customary rules which they were called upon to apply or approve. In the place of sophisticated analysis there may be found more often than not a decided tendency to attribute the greatest weight to consent in one form or another as a determinant. Attention may be drawn to some of the instances in which publicists and tribunals have been satisfied of the existence of an international custom almost wholly by reference to the test of consent, express or in the form of acquiescence.

(*a*) *Opinions of writers.* Sir Ernest Satow wrote of diplomatic immunities that they were 'founded on common usage and tacit consent . . . they are given on the understanding that they will be reciprocally accorded, and their infringement by a state would lead to protest by the diplomatic body resident therein'.[3] Westlake regarded the decisions of municipal courts as direct evidence of the consent of States if they proceeded on general principles and not with a view to particular circumstances 'and so far as their actions and the judgments of their courts have not been encountered by resistance or protest from other states.'[4] Professor Hyde noted that 'practical necessity has produced general governmental acquiescence in the theory that a State is to be deemed the sovereign of the air space over its territory.'[5] Professor Jessup, commenting on the limited effect which the

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[1] See Smith, *Great Britain and the Law of Nations*, vol. i (1932), p. 13; and Fitzmaurice, in this *Year Book*, 30 (1953), p. 26.

[2] 'Consent can indeed be withheld,' Sir Gerald Fitzmaurice remarked, 'but this can only be in the formative period, when general consent is still necessary to the validity of the rule. That is why dissent must be expressed at that stage in order to confer exemption: otherwise it is too late.' Ibid. Compare the views of Professor Kelsen: 'If it is assumed that international law is binding upon a state only if it is recognized by this state, it is inconsistent to apply international law to a state without a proof of such recognition, and to admit that a state cannot, by non-recognition of international law or by withdrawing its recognition, prevent the application of this law.' Op. cit., p. 313. It may be noted that in its Judgment (*I.C.J. Reports*, 1951, p. 131), the Court upheld the contention of the United Kingdom and Norway in their pleadings in the *Fisheries* case that a State would not be bound by a general customary rule the validity of which it had consistently and from the first refused to recognize by protesting. See Fitzmaurice, loc cit., pp. 25–26; and see the writer's observations, ibid., pp. 318–19.

[3] *A Guide to Diplomatic Practice* (3rd ed., revised by Ritchie, 1932), p. 162.

[4] *Collected Papers*, p. 83.

[5] *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. i, p. 587. And see ibid., p. 455: 'There is no dispute that the marginal sea belonging to a State . . . embraces a belt of three nautical miles. At present there appears to be no general acquiescence with respect to any greater width.'

Attorney-General, Sir Charles Russell, was prepared to give to consent by acquiescence in his argument in the course of the *Behring Sea Arbitration*, stated: 'With due deference to the views of an eloquent advocate, it is believed that if this right of pursuit has received the consent of the nations by acquiescence, it is a perfect right under customary international law.'[1] Professor Jessup cited a further authority[2] with regard to extensions of State control beyond the territorial belt for other purposes which, it was stated, 'has not been determined by international convention, but results from the tacit consent of nations.'[3]

There is no lack of support for the requirement of a consensual basis, sometimes in the form of acquiescence, for rules of customary international law from writers who have discussed the formation of customary international law in general terms, even from those who can scarcely be described as positivists. As Kelsen put it, modern writers 'maintain that customary international law is created by the common consent of the states; and since there is no express manifestation of this consent, a tacit consent is assumed.'[4] In a discussion of the process by which international law is altered to meet changing conditions, Professor H. A. Smith contended that 'the general consent of States must be obtained, directly or indirectly, by express agreement or by tacit acquiescence, before we can say with certainty that any given change has acquired the force of binding law.'[5] Professor Scelle, although attacking the voluntarist or consensual view as retrogressive,[6] admitted that 'Le Droit écrit ne saurait prévoir toutes les éventualités de la vie sociale. Même dans les milieux étatiques, il se développe des phénomènes de solidarité groupale, associationelle qui, s'ils sont reconnus ou tolérés, développent des droits coutumiers spéciaux ou locaux.'[1] Professor Quincy Wright observed: 'General recognition seems to be the only method known to customary international law whereby the legal consequences of facts, the validity of claims, the status of entities and changes of law can be authoritatively established.'[2] Lawrence emphasized the importance of consent in the form of acquiescence in the following passage:

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[1] *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 106. In reply to the contention of the Canadian Government, in the case of *The I'm Alone*, that the doctrine of hot pursuit had not found complete acceptance, the United States pointed out that in several cases the Federal Courts had applied the doctrine, adding that 'no protests had been made by the British or Canadian Governments against the enforcement of the doctrine of hot pursuit in these cases'. See the digest of the proceedings in Briggs, *The Law of Nations* (2nd ed., 1952), p. 386. See also the *Memorandum as to the Jurisdiction and Administrative Powers of a European State holding Protectorates in Africa*, prepared by the Colonial Office in February, 1891. The *Memorandum* quoted Vattel (ed. by Chitty, 1834, p. lxv): 'These three kinds of the law of nations, the *voluntary*, the *conventional* and the *customary*, together constitute the *positive law of nations*. For they all proceed from the will of nations: the *voluntary* from their presumed consent, the *conventional* from an *express* consent, and the *customary* from *tacit* consent'. The *Memorandum* continued: 'If, therefore, it can be shown that the nations of Europe have by formal agreement, or by acquiescence which implies consent, or by undisputed usage, recognized the principle that their subjects are judiciable by another nation beyond the territorial limits of the latter, a foundation seems to be laid sufficiently strong to uphold jurisdiction over foreigners in British Protectorates in Africa.'

[2] Crocker, *The Extent of the Marginal Sea*, p. 600.

[3] Op. cit., p. 103.

[4] Op. cit., p. 311. Kopelmanas, writing in 1937, stated: 'The authors who see in the acts of international organs the only source of custom, look upon international custom as a true tacit contract. They are not contented with the simple repetition, which might be termed "unilateral", of acts by the international representatives of the state, they require that the acts that build custom should be accepted by other states.' This *Year Book*, 18 (1937), p. 131.

[5] *The Crisis in the Law of Nations* (1947), pp. 33–34. And see ibid., p. 42, where it was stated that 'in the law of nations general consent is necessary before any particular practice can pass beyond the region of controversy and establish itself as an indisputable rule of law.'

[6] Op. cit., pp. 399–400.

> 'General usage has consecrated what partial agreement introduced; and the quiescent attitude of States . . . must be interpreted into an otiose assent. It constantly happens that small and comparatively unimportant States tacitly accept the arrangements made by great and important powers. The doctrine that a State cannot be bound without its own consent is true only if we accept as a corollary the proposition that assent may be evidenced by silent acquiescence as well as by express words.'[3]

On the opening page of the first volume of Hackworth's *Digest of International Law* it is stated: 'Customary, as distinguished from conventional, international law is based upon the common consent of nations. . . .' Finally, the views of Professor McDougal may be noted as he stated them in his penetrating study of the international law of the sea. Attributing the 'fact that the same nation-state officials are alternatively, in a process of reciprocal interaction, both claimants and external decision-makers passing upon the claims of others' to 'the present lack of specialization and centralization of policy functions in international law generally', Professor McDougal observed that the decision-makers

> 'honor each other's unilateral claims . . . not merely by explicit agreements but also by mutual tolerances . . . which create expectations that effective power will be restrained and exercised in certain uniformities of pattern. This process of reciprocal tolerance of unilateral claim is, too, but that by which in the present state of world organization most decisions about jurisdiction in public and private international law are, and must be, taken.'[4]

In a footnote to this passage he drew further attention to the predominant role of acquiescence, stating:

> 'It is not of course the unilateral claims but rather the reciprocal tolerances of the external decision-makers which create the expectation of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law. The great bulk of claims to authority and control upon the high seas are honored and protected, it may be emphasized, not by explicit bilateral or multilateral agreement, but by this process of mutual tolerance.'[5]

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[1] Scelle, op. cit., p. 399.

[2] See *American Journal of International Law*, 44 (1950), p. 557.

[3] *The Principles of International Law* (7th ed., by Winfield), p. 101.

[4] 'The Hydrogen Bomb Tests and the International Law of the Sea', loc. cit., at pp. 357–8.

[5] Ibid., p. 358, n. 7. A similar view was taken by Sir Gerald Fitzmaurice in the course of a discussion of the consensual element in custom and usage in loc. cit., p. 68.

(*b*) *Judicial and arbitral decisions*. With remarkable consistency tribunals have recognized consent, tacit or express, as a decisive factor in determining whether or not a given proposition has acquired the status of a binding rule of customary international law. In some of the cases in which courts have placed their imprimatur upon a rule of customary international law the importance of the doctrine of acquiescence has been recognized expressly, in others by implication. It is proposed to examine some of the instances in which the consensual basis of a customary rule was considered to be attributable to acquiescence.

International tribunals.[1] Chief Justice Taft, in the course of his Award in the *Tinoco Arbitration*[2] between Great Britain and Costa Rica in 1923, stated that 'however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.'[3] With regard to the rule that, in the interests of the stability of governments and the orderly adjustment of international relations, a State should be held to an attitude consistent with its deliberate conclusion on the question of recognition or non-recognition of a government claiming admission to the society of nations, the Arbitrator said: 'Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied here as a principle of international law.'[4] The Judgment of the Permanent Court of International Justice in the *Lotus* case[5] confirmed, in an indirect manner, the significance of both acquiescence and protest. The emphasis which the Court placed throughout on the non-existence of the restrictive rule for which France contended had the result of establishing *a contrario* permissive rules to the opposite effect. In rejecting the French argument that a rule had crystallized according to which criminal jurisdiction in collision cases belonged exclusively to the flag State, the Court observed:

> 'On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in

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[1] And see above, p. 123, n. 2, with regard to the *Lotus* case.

[2] The Award is printed in the *American Journal of International Law*, 18 (1924), pp. 147 et seq.

[3] Ibid., p. 153.

[4] Ibid., p. 157.

[5] *P.C.I.J.* (1927), Series A, No. 10.

accordance with international practice, that the French Government in the *Ortigia–Oncle-Joseph* case and the German Government in the *Ekbatana–West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.'[1]

One authority commented on the Judgment in these words:

> 'The Court's finding that Turkey did not disregard a rule of international law by assuming jurisdiction over an alien for an offence committed on the high seas was based not on an abstract rule, but on a thorough examination of the practice of States and of relevant municipal decisions showing the almost entire absence of protests against the assumption of such jurisdiction.'[2]

In short it may be stated that acquiescence in a practice contrary to that which is alleged to be a customary right is sufficient to refute the binding customary status of the right claimed.

Municipal courts. The decision of the United States Supreme Court in 1871 in the case of *The Scotia*[3] gave authoritative expression to the role of consent and acquiescence in the formation of custom. In ascertaining what the law was at the time and place of the collision, Mr. Justice Strong, delivering the opinion of the Court, said:

> 'Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation.'

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[1] *P.C.I.J.* (1927), Series A, No. 10, p. 29. Judge Altamira, dissenting, also drew attention to the signficance of both protest and failure to protest. 'The necessity for consent', he stated, 'is . . . a fundamental principle of international law, which is entirely based on the will of States. . . . Consequently, the consent of the interested State must be requisite in every case belonging to the category I am now considering and *a fortiori*, its express dissent must be taken into account.' He contended further that: 'the freedom which, according to the argument put forward, every State enjoys to impose its own laws relating to jurisdiction upon foreigners is . . . conditioned by the existence of the express or tacit consent of other States and particularly of the foreign State directly interested'. Ibid., p. 103.

[2] Judge Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), p. 104. See also the Judgment in the *Lotus* case, op. cit., p. 23, where the Court stated that States, far from considering themselves bound to have regard only to the place where the author of an offence happened to be at the time of the offence, held in practice that an offence was committed in the national territory if one of the constituent elements of the offence, particularly its effects, took place there. The Court observed: 'Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed its criminal law in this sense.'

[3] 14 Wall. 170: the decision is printed in Briggs, *The Law of Nations* (2nd ed., 1952), pp. 25 et seq.

With regard to the Rhodian law, the Amalphitan Table, the ordinances of the Hanseatic League and some of the marine ordinances of Louis XIV, the Court commented:

> 'They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea. . . . This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice.'

The decisions of the Supreme Court in the case of *The Antelope*[1] in 1825 and *The Paquete Habana* and *The Lola*[2] in 1900 ascribe a similar function to acquiescence. Dicta from British cases do likewise. In *R.* v. *Keyn*[3] in 1876, Kelly C.B. stated: 'I hold that no one nation has the right to exercise criminal jurisdiction over the ships of other nations [on the high seas] unless by treaty, or express agreement, or unless by some uniform, general, and long continued usage, evidenced by the actual exercise of such jurisdiction acquiesced in by the nation or nations affected by it': a limited jurisdiction, he stated, 'has been established and sanctioned by a long continued actual exercise of it by the one nation, acquiesced in by all the others against or in respect of whom it has been claimed.'[4] Chief Justice

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[1] 10 Wheaton 66. The Court, examining the legality or otherwise of the Slave Trade, stated that it was 'contrary to the law of nature', but added: 'Whatever may be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question . . . is decided in favor of the legality of the trade. Both Europe and America have embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say that a practice thus supported was illegal'.

[2] 175 U.S. 677. Referring to the view expressed by Lord Stowell in 1798 that the known custom in former wars (not to capture innocent coast fishing vessels) was a rule of comity only, the Court observed: 'But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. . . . This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act' the exemption from capture of the vessels in question 'is an established rule of international law'. Cited in Briggs, op. cit., pp. 30–33.

[3] (1876), 2 Ex. Div. 63.

[4] Ibid., p. 151.

Cockburn observed: 'To be binding, the law must have received the assent of the nations who are bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage'.[1] In a later passage he stated that 'the ability so to deal with these waters would result, not from any original or inherent right, but, from the acquiescence of other states'.[2]

V. *Conclusions*

Perhaps the most important distinction to be drawn for purposes of analysis is one between customary rules expressed as rights and customary rules expressed as obligations. As well as for those two types of customary rules, different considerations are appropriate for general, regional and exceptional customs respectively. The closer the approximation of a customary right or obligation to an historic or prescriptive right or obligation, the more relevant the doctrine of acquiescence becomes. The *opinio juris* is properly applicable to a practice only when that practice consists of submission to the exercise of a right, that is, when the practice is expressive of an obligation; and even then it is little more than the consequence of previous consent or acquiescence. It is this previous consent or acquiescence which is creative of the obligation: the consequent *opinio juris* may then accurately be said to be expressive of the rule in question, or evidence of it. Thus one difficulty which has perplexed a number of writers may be obviated: namely, how a rule can be created when the States creating it are considered as acting in the conviction that they are applying a pre-existing rule of identical content.

A consideration of some of the relevant cases, even one as summary as the foregoing, appears to dictate the conclusion that, in practice, courts have tested the validity of rules of customary international law by reference to standards which are less artificial than those suggested by the more orthodox theories of custom. Where the material elements of custom, the constancy and generality of the practice in question, have not of themselves sufficed to satisfy the tribunal,[3] the criterion on which reliance has been consistently placed has been that of general recognition or acceptance of the practice as lawful on the part of other States. Professor Briggs, in his comment on the *Asylum* case, put the matter clearly when he observed that 'the proper way to express the process by which customary international law is created is to say that a particular pattern of state conduct, hitherto legally discretionary, has acquired obligatory force through its general acceptance by states as a legal obligation.'[1] That general acceptance, or recognition, has frequently assumed the form of acquiescence, which, as the writer has suggested elsewhere,[2] mitigates the rigours of the positivist view and imparts a welcome measure of controlled flexibility to the process of formation of rules of customary international law.

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[1] *R.* v. *Keyn* (1876), 2 Ex. Div. 63, p. 202.

[2] Ibid., p. 207. And see *West Rand Gold Mining Company Ltd.* v. *The King*, [1905] 2 K.B. 391. The Imperial Supreme Prize Court in Berlin in the case of *The Elida*, pointing out that to permit States to extend their territorial waters by independent regulations would be intolerable in modern conditions, because of the interest all maritime States had in the freedom of the high seas, added: 'To a certain extent this is also acknowledged by Liszt in his opinion, for according thereto the regulation of the individual State is not alone sufficient; the absence of objection on the part of other States is also required. Thereby in reality the permissibility of an extension of the territorial waters is founded not so much upon the independent regulation by the single State, as upon the supposition of a tacit acknowledgment of such an extension by the other States. A mere failure to object, however, is not identical with a positive concurrence of the nations.' The decision is translated in the *American Journal of International Law*, 10 (1916), pp. 916 et seq.

[3] The factor of consent in these circumstances appears to have been taken for granted: and, in the nature of the case, to have emphasized it might well be considered a superfluous procedure.

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[1] 'The Colombian–Peruvian Asylum Case and Proof of Customary International Law', in *American Journal of International Law*, 45 (1951), pp. 728–31, at p. 730.

[2] See this *Year Book*, 31 (1954), pp. 184–5. And see Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 102–3.

EXTRATERRITORIAL JURISDICTION AND THE UNITED STATES ANTITRUST LAWS

By PROFESSOR R. Y. JENNINGS

THE United States antitrust laws are officially described as 'a distinctive American means for assuring competitive economy on which our political and social freedom under representative government in part depend'.[1] They are comprised in an elaborate and highly technical body of legislation and cases, which it is no part of the purpose of this article to attempt to explain, except in so far as it raises questions of international law. It is necessary, however, to be acquainted with the four main provisions of the parent law, the famous Sherman Act of 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies'. By section 1, 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations' is declared illegal, and every person making such an arrangement guilty of a midemeanour punishable by fines, or imprisonment, or both. By section 2, 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations' shall also be guilty of a misdemeanour punishable as under section 1. Section 4 provides for the institution in district courts of 'proceedings in equity to prevent and restrain' violations of the Act. By section 7, any person 'who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act' may sue the defendant for threefold damages and costs.

The Sherman Act was supplemented in 1914 by the Federal Trade Commission Act and the Clayton Act; and these three statutes, together with several minor enactments, form the antitrust legislation for the 'promotion of competition in open markets'; and this law has always been vigorously enforced by the Department of Justice and by the courts. It is, said Franklin Roosevelt, 'as much a part of the American way of life as the due process clause of the Constitution'.

But many great monopolies and cartels do not operate merely within the territory of one State. They involve agreements between both United States and foreign firms, the network of understandings and controls operating in several different countries. Thus they may be too far flung for a strictly territorial antitrust law to control effectively. In attempting to cope with this problem the United States courts have not hesitated to reach out after such trust arrangements, so that, especially in decisions of the courts during the last decade or so, antitrust law has been given in many respects an extraterritorial application of a most radical and even novel kind. These decisions accordingly raise and illuminate classic questions of jurisdiction which are among the most important as well as the most intractable problems of international law. It is the purpose of this article to draw attention to these problems and to offer some tentative suggestions for their solution.

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[1] Report of *The Attorney General's National Committee to Study Antitrust Laws* (1955), U.S. Government Printing Office, p. 1.

First, however, it will be necessary to glance at the theory of the matter. It is proposed to begin with an examination of the purport of the so-called territorial principle of jurisdiction; and then to investigate the various grounds upon which States have from time to time claimed the right to extraterritorial jurisdiction. Some United States antitrust decisions will then be examined in the light of this discussion of principle, and, finally, it will be convenient to state any conclusions that may be drawn.

At the outset of the inquiry, however, the question arises how far the principles governing penal jurisdiction are applicable to the antitrust actions; for whilst there can be no doubt that prosecutions under sections 1 and 2 of the Sherman Act are criminal actions, it has been suggested that this is not true either of the equitable proceedings under section 4, or the civil actions for threefold damages under section 7 of that Act, nor under section 4 of the Clayton Act.[1] And, indeed, it has been held by the Supreme Court that the latter at least is compensatory in character.[2] The question, however, is not whether the matter is properly called criminal in the municipal law, but whether it is penal for the purposes of international law; and this is a question not merely of procedure but of substance. The term 'crime' for this purpose is defined by an American authority as 'an act or omission which is such an offence by the law of the State assuming jurisdiction', and 'includes only these acts or omissions which are denounced as offences, i.e. as acts or omissions inimical to the public interest.[3] It never includes mere civil wrongs which may be expiated by restitution or reparation to the injured individual.' Antitrust offences manifestly come within this definition, whatever the procedure invoked. Sections 1 and 2 of the Sherman Act define them as criminal and punishable with fine or imprisonment. The 'equitable' procedures of section 4 are available in respect of the offences defined in sections 1 and 2, and are no more than powerful auxiliary weapons particularly useful against the juristic persons who are the normal and most important defendants. Disobedience to the court orders would be a contempt for which strictly criminal procedures would be immediately appropriate. Even the civil action under section 7 is for threefold, i.e. punitive and coercive, damages; this is by no stretch of the imagination mere 'restitution or reparation to the injured individual'.

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[1] See, e.g., C. K. Carlston, *Northwestern University Law Review*, 49 (1954), p. 573.

[2] *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906).

[3] *Harvard Research* (1935), ii. Jurisdiction with respect to Crime, Article 1.

I

The Territorial Principle of Jurisdiction[1]

The first principle of jurisdiction is that in general every State is competent to punish crimes committed upon its own territory.[2] This rule requires no authority to support it; it is 'everywhere regarded as of primary importance and of fundamental character'.[3] Stated thus, then, the territorial principle commands universal assent. The question immediately arises, however, how far this territorial jurisdiction is exclusive.[4] Can the territorial principle be stated in a negative form, viz. that States are in general *not* competent to punish crimes which were committed in another State's territory? Here at once we enter a realm of doubt and controversy. The traditional Anglo-American doctrine of criminal jurisdiction is supposed to adhere strictly to the maxim *extra territorium jus dicenti impune non paratur*,[5] to the extent that even a national when abroad is ordinarily without the range of the criminal law of his own country. Statements that crime is local, and that States have no jurisdiction over aliens abroad, are legion in both English[6] and American[7] decisions; as also in other countries sharing a common law tradition.[8]

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[1] By jurisdiction is here meant the competence of the *State* in international law; not the competence of particular State organs in the municipal law. See Joseph Beale in *Harvard Law Review*, 36 (1923), p. 241: 'The power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by judgment of a Court, is called *jurisdiction*.'

[2] Viz. except when there is a recognized immunity: i.e. Heads of States, diplomatic agents, foreign armed forces, and the like.

[3] See *Harvard Research*, loc. cit., p. 445.

[4] See, e.g., Marshall C.J. in *The Schooner Exchange* v. *McFaddon*, (1812) 7 Cranch, 116: 'The Jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.'

[5] See Broom's *Legal Maxims* (10th ed., 1939), pp. 56–57. See Kenny's *Outlines of Criminal Law* (Turner's ed., 1952), p. 446: 'Great Britain (like France and the United States) prefers, in nearly all cases, to adhere to the principle that crimes are local matters, to be dealt with where they are committed.'

[6] 'All criminal prosecutions are local'; *per* Lord Hardwicke C.J. in *R.* v. *Hooper*, (1730) W. Kel. 190. 'It is true beyond all doubt that, as a matter of right, no State can claim jurisdiction of any kind within the territorial limits of another State'; *per* Dr. Lushington in *Papayani* v. *Russian S.N. Co*, (1863) 2 Moore, P.C. (N.S.) 181. 'All crime is local. The jurisdiction over crime belongs to the country where the crime is committed'; *Macleod* v. *A.G. for N.S.W.*, [1891] A.C. 455. 'All jurisdiction is purely territorial, and *extra territorium jus dicenti impune non paratur*'; *Surdar Gurdyah Singh* v. *Rajah Faridkote*, [1894] A.C. 670.

See also *The Queen* v. *Sera*, (1845) 1 Den. C.C. 104; *R.* v. *Keyn*, (1876) 2 Ex. Div. 63; *British S. Africa Co.* v. *Co. de Mocambique*, [1893] A.C. 602, 624; *Croft* v. *Dunphy*, [1933] A.C. 156, 162.

Also cases set out in Forsyth, *Cases and Opinions on Constitutional Law* (1869), ch. vii.

[*For notes 7 and 8 see opposite.*]

But this traditional Anglo-American understanding of the territorial principle has never been an *absolute* principle even of the common law countries themselves. Thus, although it is true that in England, 'in the absence of an intention clearly expressed or to be inferred either from its language or from the object, subject-matter, or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom',[1] yet there is no lack of statutes where a contrary intention is to be collected. Thus the courts have extraterritorial jurisdiction over treason, murder, bigamy, and a number of other crimes.[2] Nor are similar precedents lacking in the law of the United States.[3] In any event, the strict notion that *all* crime is local has never commanded the general assent of States, and has never therefore been a rule of international law.

One aspect of the territorial principle is, of course, unassailable: there is general agreement that a State may not, unless by permission, exercise its power in a physical sense in the territory of another State. 'It is, of course, universally accepted', says Sir Eric Beckett, 'that no State can perform acts of sovereignty inside the territory of another, nor can it send its officials on to foreign soil to arrest, try, or punish offenders there, whoever they may be or whatever they may have done.'[4] But the writers—particularly English and American— of half a century ago went much further. They maintained that international law does not, save perhaps in a few exceptional cases, permit a State to exercise any kind of penal jurisdiction over aliens for what

[1] Maxwell on the *Interpretation of Statutes*, 9th ed., p. 149. See also *Naim Molvan* v. *A.G. for Palestine*, [1948] A.C. 351, 367; and *R.* v. *Martin*, [1956] 2 W.L.R. 975.

[2] See, e.g., 35 Hen. VIII, c. 2 (Treason); Offences against the Person Act, 1861; Official Secrets Act, 1911 & 1920; Explosive Substances Act, 1883; Foreign Enlistment Act, 1870; Ballot Act, 1872; Corrupt Practices Act, 1883; Criminal Justice Act, 1948, s. 31. See also *In re a Debtor* (1948) 64 T.L.R. 446; *Théophile* v. *The Solicitor-General*, [1950] A.C. 186; *Howgate* v. *Bagnall*, [1951] 1 K.B. 265.

The Merchant Shipping Act, 1894, s. 687, even confers jurisdiction over *aliens* who have been employed on a British ship within the last three months.

[3] See *Blackmer* v. *United States*, 284 U.S. (1932) 421; *United States* v. *Bowman*, 260 U.S. 94.

[4] In this *Year Book* (1925), p. 44. See also the *Lotus* case, *P.C.I.J.* (1927), Series A, No. 10, p. 18: 'Now the first and foremost restriction imposed by international law is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'

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[7] *Slater* v. *Mexican Nat. R. Co.*, 194 U.S. 120; *Millikan* v. *Pratt*, 125 Mass. 374; and see especially the *American Banana* case discussed below at p. 161.

See also Wheaton, *Elements of International Law* (8th ed. by Dana, 1866), § 113.

In 1910 the Department of State declared that: 'inasmuch as, under Anglo-Saxon legal theory, crime is territorial, not personal, and therefore the criminal jurisdiction of the United States does not, as a general rule, extend to crimes committed outside of its jurisdiction, whether by American citizens or aliens, . . .'; *For. Rel.* 1910, 518.

[8] E.g. *Ram Narain* v. *The Central Bank of India Ltd.*, (1951), High Court of India. *International Law Reports, 1951*, Case No. 49.

they have done whilst abroad.[1] That form of the territorial principle, however, belonged perhaps to the days when communications and travel were still comparatively difficult. In our present shrunken world such a strictly territorial division of jurisdiction may, it can be suggested, be unworkable, besides being at variance both with the long-established practice of many States,[2] with modern writers of authority,[3] and with a decision of the Permanent Court of International Justice which, whilst admittedly controversial, is not lightly to be rejected.[4]

Are we to conclude then that extraterritorial jurisdiction is a matter left within the discretion of each sovereign State; that it is not governed by international law? The practice of States leans against such a conclusion. For the fact is that States do not give themselves unlimited discretion in the matter. Their municipal laws—even those of States which make extensive claims to extraterritorial jurisdiction—contain principles of jurisdiction such as the nationality principle, the protection principle, the universality principle and the like.[5] It seems reasonable to infer from the existence of these principles of extraterritorial jurisdiction, firmly entrenched as they are in the practice of States, that some such justifying principle is thought to be necessary to found extraterritorial jurisdiction; that it is not a matter of sovereign discretion. The importance attached by States to nationality as a source of jurisdiction is particularly striking. For if it were indeed the case that States might at their absolute discretion exercise extraterritorial jurisdiction, then for the purposes of jurisdiction nationality would be largely pleonastic. This cannot be so. The inference is irresistible that the principle of nationality extends a salient into an area which is otherwise forbidden or at least dubious ground. Indeed, unless there be some legal as well as a practical limit on extraterritorial jurisdiction, even the territorial principle itself is self-defeating, and the claim of a court to have jurisdiction over an offence because it was committed within the territory becomes, for the purpose at least of international law, a work of supererrogation. Moreover, the reason of the thing demands that there be some external limit upon the exercise of extraterritorial jurisdiction. It would be intolerable if States were permitted without any justifying legitimate interest to attempt to control the doings of foreigners in their own countries.

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[1] See, e.g., Hall, *A Treatise on International Law* (8th ed., 1924), p. 263; Westlake, *International Law*, Pt. I (1910), pp. 261 et seq.; Lawrence, *Principles of International Law* (7th ed., 1930), pp. 221–3; Oppenheim, *International Law* (8th ed., 1955), vol. 1, p. 331, note 4; Fauchille, *Droit international public* (1922), s. 264; Brierly, *Law Quarterly Review*, 44 (1928), p. 154; Beckett, op. cit. Also, Mr. Justice Story in *The Apollon*, 9 Wheat. 362, 370: 'The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And however general and comprehensive the phrases used in municipal laws may be, they must always be restricted in construction, to places and persons upon whom the legislature have authority and jurisdiction.'

[2] *Harvard Research*, loc. cit. Also, Donnedieu de Vabres, *Les Principes modernes du droit pénal international* (1928).

[3] E.g. Bourquin in *Hague Receuil*, 1 (1927), pp. 120 et seq.; Judge Sir Hersch Lauterpacht, in his 8th ed. of Oppenheim, op. cit., pp. 331 et seq., and also in *Cambridge Law Journal*, 9 (1947), pp. 342–4; K. S. Carlston, *Northwestern University Law Review*, 49 (1954–5), pp. 569 and 713.

[4] *The Lotus*, *P.C.I.J.* (1927), Series A, No. 10.

[5] See below, p. 153.

Is it possible then to formulate a countervailing principle which will mark the ultimate limit to extraterritorial jurisdiction? The countervailing principle must surely be this: that extraterritorial jurisdiction may not be exercised in such a way as to contradict the local law at the place where the alleged offence was committed. Consider the case where a State claims jurisdiction over the doings of an alien, say in his own country. This may, in the extreme case, produce an actual collision of municipal laws; the alien may be required to act in a way which his own law forbids. In this case it is obvious that the local law must be preferred; not to do so would be to permit one State to interfere in the affairs of another, for it would be to subordinate the municipal law to an external municipal system. Moreover, a concurrent jurisdiction which is actually contrary to the local law must trench upon the claim to territorial jurisdiction itself.

The same answer must also be given in the case where the alleged offence against the extraterritorially operated law was done under cover of a liberty guaranteed by the local law, such as the freedom of speech, or association, of the press. For again, to give a different answer would be to subordinate local law to external law, to allow an external sovereignty in part to displace the local sovereignty.

A more difficult question arises, however, in the much commoner situation where there is no direct collision between the local and the external laws, but where, nevertheless, the act which offended against the external law was perfectly lawful in the law of the place where it was done. Here again, however, the answer ought in general to be that the exercise of the extraterritorial jurisdiction is contrary to international law. There may still be a real contradiction between the local law and the extraterritorial law, for the ethos of a system of law is to be collected as much from what it leaves to individual freedom and discretion as from what it requires, or forbids, or guarantees.[1] Moreover, in any given matter the occurrence of an actual collision between the two laws will be to some extent fortuitous; and in any case to require a collision before the local law is made to prevail is to put a liberal régime, which leaves much to individual discretion, at a disadvantage. In general, then, it would be intolerable if a person can be put in jeopardy of a criminal law to which he has never owed allegiance for an act which was entirely lawful in the place where he did it.

The difficulty arises, of course, from the fact that this principle of limitation

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[1] This is especially true, of course, where there is no written constitution.

—that extraterritorial jurisdiction ought not to be used to punish an act which was lawful where it was done—cannot be made an absolute one. It is conceivable, for example, that a State's laws may be unreasonably lax in providing safeguards against the use of its territory for the fermenting of revolutionary disturbance among its neighbours.[1] In such a case it may be proper that a neighbour should be able to exercise extraterritorial jurisdiction over an act, aimed at its own safety or vital interests, which act was nevertheless lawful where it was committed. Again, it would seem proper that a State should be able to exercise extraterritorial jurisdiction over a common crime, one of the *delicta juris gentium*, even though in a given case the act was, exceptionally, quite lawful at the place where it was done.[2]

In such a position it is always tempting to try to resolve the dubiety by calling in aid the technique of the burden of proof. Thus, some writers have said that the burden is necessarily on the State claiming a right to extraterritorial jurisdiction to justify the claim by some ascertained, permissive rule of international law.[3] On the other hand, it may be said, since restrictions upon a State's sovereignty are not to be presumed, it is for the objecting State to show an ascertained, prohibitive rule of international law.[4]

It seems doubtful, however, how far general propositions about the burden of proof are helpful; for to ask on whom the burden of proof is to fall is little more than a way of begging the principal question.

The fact of the matter is that all these principles represent different aspects of the legitimate interests of States and are therefore relative. This is not to say, however, that States may claim extraterritorial jurisdiction in their absolute discretion unless faced with a prohibitive rule. For the practice of States indicates no such assumption. States claim extraterritorial jurisdiction in cases where they believe their legitimate interests to be concerned; whether that assumption be rationalized and expressed by means of the nationality claim, the objective territorial claim, the security claim, the passive personality claim or the universality claim. It is reasonable to say, therefore, that international law will permit a State to exercise extraterritorial jurisdiction provided that State's legitimate interests (legitimate that is to say by tests accepted in the common practice of States) are involved; but against this must be set also the legitimate and reasonable interests of the State whose territory is primarily concerned, for the extraterritorial exercise of jurisdiction must not be permitted to extend to the point where the local law is supplanted: where in fact it becomes an interference by one State in the affairs of another. The position can be expressed in terms of the doctrine of abuse of rights. A State has a right to extraterritorial jurisdiction where its legitimate interests are concerned, but the right may be abused, and it is abused when it becomes essentially an interference with the exercise of the local territorial jurisdiction.

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[1] Sir H. Lauterpacht, in *American Journal of International Law* (1926).

[2] Cf. *Factor* v. *Laubenheimer*, 290 U.S. 276.

[3] E.g. Beckett in this *Year Book*, 2 (1925).

[4] Cf. the judgment in the *Lotus* case, *P.C.I.J.* (1927), Series A, No. 10: 'It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws outside their territory, and, if as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.'

II

Principles of Extraterritorial Jurisdiction

We have already mentioned the various principles which in different municipal laws are held to found extraterritorial jurisdiction. There are five such: nationality; passive personality; security; universality; and finally the objective territoriality test.[1] Each of these must now be considered.

(i) *The principle of nationality*

Subject always to the general limitation indicated above, international law permits a State to claim jurisdiction over its nationals without territorial limit. The common law countries have been sparing in their use of this liberty, preferring in the main to rely on the territorial claim. Nevertheless, United States courts have claimed extraterritorial jurisdiction over nationals in some important respects. They have decided, for example, that a United States citizen abroad can be required to return home to give testimony before a government tribunal.[2] This jurisdiction has also been used to prevent a United States citizen, doing business in Mexico, from there using a Mexican trade mark which infringed a United States trade mark. 'Congress', said the Court in this case, 'in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States.'[3]

Obviously, this jurisdiction is relevant to antitrust activities of United States nationals, including United States corporations; and in fact the courts have not hesitated to use this competence. In the case of juristic persons, however, it is a question of some moment how nationality is to be established. On the face of it, the ordinary test of corporate domicil and registration gives the answer. The court might, however, elect to go behind the corporate screen and inquire where the actual control of the corporation's affairs resides: such a real test of the nature of a corporation is now commonplace in prize law, and is also to be found in some kinds of international convention.[1] The question arises how far the United States courts would be justified in employing such a test when faced with antitrust activities abroad of a foreign corporation which is substantially controlled by an American corporation or American citizens. As will appear later,[2] the American courts have not in fact hesitated to make intimate inquiries into the control and activities of foreign as well as of American corporations in antitrust cases; not, however, to the end of establishing jurisdiction as on a basis of nationality, but either to establish the 'presence' within the jurisdiction for procedural purposes, of a foreign corporation, or to establish a chain of cause and effect to bring the activities of a foreign corporation within one of the interpretations of the territorial principle of jurisdiction. In fact here as elsewhere the territorial principle, as interpreted by the courts, has been a more potent weapon than any development of the nationality principle could be.

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[1] Cf. *Harvard Research*, loc. cit., p. 445.

[2] *Blackmer* v. *U.S.*, 284 U.S. 421.

[3] *Bulova Watch Co.* v. *Steele*, 194 F. 2d. 567, aff'd. at 344 U.S. 280 (1952). It should be added that a Mexican court had already held the Mexican trade mark invalid. Cf. *Vanity Fair Mills* v. *T. Eaton Co. Ltd.*, 77 S. Ct. 96, 352 U.S. 871 (1956), discussed below at p. 169.

(ii) *The passive personality principle*

This is the notion according to which a State claims the right to punish aliens for offences committed abroad to the injury of their own nationals. It is also sometimes, therefore, called the 'protection principle'. It was at the centre of the great debate in the *Cutting* case.[3] Its validity was raised but not firmly decided in the *Lotus* case,[4] where, however, it met with trenchant criticism from Judge Moore, the American Judge:

> 'What, we may ask, is this system? In substance, it means that the citizen of one country, when he visits another country, takes with him for his "protection" the law of his own country and subjects those with whom he comes into contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes. This is by no means a fanciful supposition; it is merely an illustration of what is daily occurring, if the "protective" principle is admissible. It is evident that this claim is at variance not only with the principle of the

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[1] E.g. the 'substantial ownership clause' in some bilateral conventions granting commercial privileges in the territorial airspace to foreign aircraft.

[2] See below, p. 171.

[3] See Moore's *Digest*, vol. 2, pp. 228-42.

[4] The Court said the contention of France alleging the invalidity in international law of the Turkish code giving jurisdiction where a Turkish national was injured, related 'to the case where the nationality is the only criterion on which the criminal jurisdiction of the State is based', and then went on to discuss the argument that the crime could be said to have taken effect on Turkish territory. The implication seems to be that the territorial argument was decisive.

exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.'

This is perhaps the most questionable of all grounds that have been advanced to justify extraterritorial jurisdiction. It is certainly one that can easily be abused. But it has found no place in Anglo-American jurisprudence and it seems therefore unnecessary to consider it further for the purposes of this paper.

(iii) *The security principle*

The claim that a State may exercise extraterritorial jurisdiction over crimes of aliens directed against its security, credit, political independence, or territorial integrity—it is variously defined—has, though again traditionally suspect in Anglo-American jurisprudence, a firm place in the practice of a number of States. The need for it is said to arise because States do not always have laws of their own to restrain the preparation on their territories of subversive activities against their neighbours. So that in many cases where this principle is employed, an alien defendant may be prosecuted for an offence which was lawful in the jurisdiction where he was at the material time.

This principle, again, is obviously capable of abuse. A State might have peculiar and even outrageous notions of what affects its security or what is a vital interest. Moreover, the freedom of the individual to criticize his Government and even to work for its overthrow may be thought to be at least as important as the protection of particular State institutions. Thus it has been suggested that the crimes subsumed under this heading ought to be limited and defined;[1] and the Harvard draft code proposed to solve the problem by adding the limitation that the jurisdiction might not be exercised where the alleged offence was done under cover of a liberty guaranteed by the local law.[2] The development of an international law of human rights gives hope that some such limitation may eventually be carried by international law itself, without the necessity of appealing to the guarantees of local law.

Again, however, the security principle has not appeared *eo nomine* in American antitrust cases, and although theoretically it is a matter for consideration whether the principle might not in some respects be apposite, the ground is in fact more than covered in the American courts by their extremely flexible notions of territorial jurisdiction.

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[1] See Brierly, 'Criminal Competence of States in Respect of Offences Committed Outside their Territory'. Supp. to *American Journal of International Law* (1926).

[2] *Harvard Research*, loc. cit., Article 7.

(iv) *The universality principle*

This is based on the idea that the suppression of crime is an interest common to all States and to all mankind. The pirate is the obvious example of the *hostis humani generis*, but the notion of general jurisdiction is also met with in relation to what may be called 'international crimes', like traffic in women and children, or drugs. The idea also supports the general jurisdiction over certain offences defined in the Geneva Conventions of 1949.[1] It is also to be found in a more particular form in the rule that jurisdiction may be exercised extraterritorially whenever the offence was also a crime where it was committed, following the Grotian maxim *aut dedere aut punire.*

At the present day, at any rate, there can be no question of the United States version of antitrust laws being regarded as having any universal ingredient; it is a law peculiarly American both in concept and enforcement.[2]

(v) *Extensions of the territorial principle*

In the ordinary cases where an offence is committed wholly within the territory of one State, the territorial principle of jurisdiction is unambiguous. But it can also happen that different elements of the offence take place in different States; for example, where there is a killing by a shot fired across the State boundary. Whose then is the jurisdiction?

This problem has been solved, particularly in the common law countries, by two elaborations of the basic territorial principle. The first is the *subjective* territorial principle 'which establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consummated abroad'.[3] The second is the *objective* territorial principle 'which establishes the jurisdiction of the State to prosecute and punish for crime commenced without the State but consummated within its territory'.[4]

These two extensions of the territorial principle are clearly not only justified but necessary if the offence astride the frontier is not to escape punishment altogether. The objective application in particular has been adopted into general jurisprudence.[5] As the leading American authority on the subject put it:

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[1] For English law see Geneva Conventions Act, 1957.

[2] See G. W. Haight, *Yale Law Journal*, 63 (1954), pp. 644–8, for a comparison with the laws of other principal industrial States.

[3] *Harvard Research*, loc. cit., p. 486.

[4] Ibid., p. 487.

[5] It is thus expressed in the Harvard draft convention, Article 3:

'A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

This jurisdiction extends to

(*a*) Any participation outside its territory in a crime committed in whole or in part within its territory; and

(*b*) Any attempt outside its territory to commit a crime in whole or in part within its territory.'

'The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries.'[1]

The objective application has had a particularly prominent place in English and American case law. In English law it has been used both to solve problems of venue[2] and questions of jurisdiction between countries.[3] In the United States it has been used to solve problems of jurisdiction between States of the Union and internationally.[4] Above all, it has played a decisive role in the extension of antitrust jurisdiction.

The objective application of the territorial principle is a most flexible and far-reaching technique of jurisdiction. It has enabled the common law countries, whilst insisting that all crime is local and that jurisdiction over crime is strictly territorial, in fact to acquire jurisdiction in many ways as extensive as that of countries which frankly claim extraterritorial rights under one of the principles discussed above.[5] Moreover, it is important to notice that this technique is, in the appropriate case, a claim not to extraterritorial jurisdiction but to territorial jurisdiction.[6] And in so far as that claim is found to be justified, the jurisdiction thus founded may be said to escape whatever limitations international law places upon the exercise of extraterritorial jurisdiction. For it cannot seriously be argued that international law restricts the competence of States to try and punish crimes committed on their own territory. It is of great importance, therefore, to try to establish the limits within which the subjective and more particularly the objective applications of the territorial principle may be employed.

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[1] John Bassett Moore in *A Digest of International Law* (1906), vol. ii, p. 244.

[2] E.g. in 7 Geo. IV, c. 64, s. 12: 'if any felony or misdemeanour shall be begun in one county and completed in another, such felony or misdemeanour may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in such manner as if it had been actually and wholly committed therein.' See also *Bulwer*'s case, 7 Co. Rep. 1a.

[3] See Cooke, *Institutes*, 2, p. 318; *R.* v. *George Coombes*, (1785) 1 Leach, 388; *R.* v. *Munton*, (1793) 1 Esp. 61; *R.* v. *Jones*, (1850) 1 Den. C.C. 551; *R.* v. *Garrett*, (1853) 6 Cox C.C. 260; Dears C.C. 232; *R.* v. *Lewis*, (1857) 7 Cox C.C. 277; *R.* v. *Taylor*, (1865) 4 F. & F. 511; *R.* v. *Armstrong*, (1875) 13 Cox C.C. 184; *Reg.* v. *Jacobi & Hiller*, (1881) 46 L.T. 595 n.; *Queen* v. *Nillins*, (1884) 53 L.J. (M.C.) 157; *King* v. *Oliphant*, [1905] 2 K.B. 67; *R.* v. *Stoddart* (1909) 2 Cr. App. R. 217; *King* v. *Godfrey*, [1923] 1 K.B. 24. Other cases are collected in Moore, op. cit., pp. 244 et seq.

[4] *People* v. *Adams*, (1846) 3 Den. (N.Y.) 190 (1848) 1 Comst. (N.Y.) 173; *U.S.* v. *Davies*, 2 Sumner, 482; *Lamar* v. *United States*, (1916) 240 U.S. 60; *Ford* v. *United States*, (1927) 273 U.S. 593; *State* v. *Nahoum*, 172 La. 83, A.D. 1931–32, Case No. 68; *Ex parte Hammond*, 59 F. (2d.) 683 (1932), A.D. 1931–2, Case No. 66; *U.S.* v. *Steinberg et al.*, 62 F. (2d.) 77; *U.S. ex rel. Majka* v. *Palmer*, 67 F. (2d.) 146 (1933), A.D. 1919–42, Case No. 59.

[5] See Bourquin, *Recueil des Cours*, 1 (1927), p. 120, at p. 177: 'la différence entre les deux systèmes ne tient plus aux principes; ce n'est plus qu'une question de modalités.'

[6] See *R.* v. *Nillins*, loc. cit., an extradition case where the question was whether the accused, though at all material times in England, had committed a crime in the jurisdiction of Germany. Cave J. said: 'it cannot be seriously contended that he did not commit the crime in Germany; he procured the goods there, he altered the forged notes there. . . . It is clear then that the crime was committed in a foreign State.'

Cf. also *People* v. *Adams*, *ubi supra* at p. 210: 'This in no sense implies an extension of our laws beyond the territorial limits of the State. The defendant may have violated the law of Ohio by what he did there, but with that we have no concern. . . . He was indicted for what was done here, and done by himself. True, the defendant was not personally within the State, but he was here in purpose and design, and acted by his authorized agents. . . . Here the crime was perpetrated within this State, and over that our courts have undoubted jurisdiction.'

The essential requirement of the objective applications of the territorial principle is that some part of the crime should in fact have taken place within the territory of the State claiming jurisdiction. Now in some cases the court has, for one reason or another, not been content with this factual basis but has added the corollary that the accused must be regarded as having been himself 'constructively' present in the territory when his crime was there consummated. It is always tempting to put it this way where the offender has acted through a local and maybe innocent agent, for *qui facit per alium facit per se*; but the fiction of constructive presence has also figured in the language of judges in more fanciful contexts.[1] In all these cases, however, the substantial ground of jurisdiction is the locality of the act; whether or not the actor is supposed to be constructively present at the consummation of his crime makes no difference to the result and is a mere matter of legal vocabulary.[2]

The notion of constructive presence, though in itself a harmless fiction, has deceived some authorities into speaking of the objective test of jurisdiction as if it were in its entirety a fiction.[3] Now it is no doubt true that where a crime is committed in two different territories it is logically committed in neither territory;[4] and to the extent that the law permits it to be regarded as committed in either one territory it imports an element of fiction. But the objective application rests ultimately on fact, not on fiction. It applies only where some part of the offence was in fact territorial.

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[1] E.g. in *Simpson* v. *State*, (1893) 92 Ga. 41, 43, a case of shooting across the State line:

> 'So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes. . . . He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was therefore, in a legal sense, after the ball crossed the State line up to the moment it stopped, in Georgia.'

This may, of course, be in order to overcome some difficulty in the municipal law. E.g. where 'malice' is a requirement of a crime it may be argued that such a crime cannot be committed in two places but only in the place where the act was done. Thus in *County Council of Fermanagh* v. *Farrendon*, [1923] 2 Irish Reports, 180—another case of malicious shooting across the border—the court said:

> 'I think that if a man fires at another with intent to wound, the intent is present during every fraction of space and moment of time that is traversed by the bullet from the moment it leaves the lethal weapon until it strikes or passes its victim. There, therefore, was continuous malice in "the intent" of the bullet, not only in Donegal, till it crossed the border, but also in Fermanagh, from the border till it struck the applicant; in other words it is the same thing as if the assailant was himself firing it every inch of its course.'

[2] Cf. *People* v. *Adams*, (1846) 3 Den. (N.Y.) 190, 207: 'Personal presence, at the place where the crime is perpetrated, is not indispensible to make one a principal offender in its commission.'

[3] E.g. the dissenting opinion of Judge Loder in the *Lotus* case, *P.C.I.J.* (1927), Series A, No. 10, p. 37: 'It is clear that the place where an offence has been committed is necessarily that where the guilty person is when he commits the act. The assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction.'

[4] See Cockburn C.J. in *R.* v. *Keyn*, (1876) 2 Ex. Div. 63, 233.

This leads to the consideration of a most important aspect of the objective territorial principle. It is often said to apply where the offence 'takes effect' or 'produces its effects'[1] in the territory. In relation to elementary cases of direct physical injury, such as homicide, this is unexceptionable, for here the 'effect' which is meant is an essential ingredient of the crime. Once we move out of the sphere of direct physical consequences, however, to employ the formula of 'effects' is to enter upon a very slippery slope; for here the effects within the territory may be no more than an element of alleged consequential damage which may be more or less remote. The difficulty and ambiguity of the term 'effects' in this connexion is aptly illustrated by the well-known *Cutting* case, which concerned the prosecution in a Mexican court for criminal defamation of a Mexican by a United States citizen resident in Mexico in respect of an article in a Texas newspaper.[2] Thus to extend the notion of effects, without qualification, from the simple cases of direct physical injury to cases such as defamation, sedition, and the like, is to introduce a dangerous ambiguity into the basis of the doctrine. If indeed it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another territory, then there were virtually no limit to a State's territorial jurisdiction.

It is clear from the authorities, however, that so radical an extension of the doctrine is not warranted and that the ingredient of 'effects' cannot be understood without qualification. Hyde, the leading American authority, says that the injurious effect on the prosecuting State must be the 'direct consequence' of the force set in motion outside of the State.[3] And again, he says, the limits imposed by international law 'are not violated when a State, in pursuance of its law penalises the actor on account of an offence committed outside the territorial limits when it proves to be the *proximate cause* of a public or private injury sustained within those limits'.[4] The majority judgment in the *Lotus* case, which was decided on the objective test of territoriality, says that many countries regard offences as having been committed in their national territory 'if one of the constituent elements of the offence, and more especially its effects, have taken place there'.[5] Later in the judgment it is made clear that by 'effects' is here meant those effects which are a constituent element in the crime, for the court says the negligence on the French ship and the effect felt on the Turkish ship were 'legally and entirely inseparable, so much so that their separation renders the offence non-existent'.[1] Again, in the opinion of Judge Moore, which carries great authority in this matter, there occurs the following passage:

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[1] See, e.g., H. Lauterpacht, *Cambridge Law Journal*, 9 (1947), at p. 344, where the learned author, discussing the *Joyce* case, refers to 'the doctrine of the locality of the act as determined not by the place of its causation but by the *situs* of its effect'.

[2] See Briggs, *The Law of Nations* (2nd ed., 1952), p. 571, and his comments on p. 577.

[3] Hyde, *International Law, chiefly as Interpreted and Applied by the United States* (2nd ed., 1945), vol. i, p. 798.

[4] Ibid., p. 800.

[5] *P.C.I.J.* (1927), Series A, No. 10, p. 23

> 'In no case has an English or American court assumed jurisdiction, even under statutes couched in the most general language, to try and sentence a foreigner for acts done by him abroad, unless they were brought, either by immediate effect or by direct and continuous causal relationship, within the territorial jurisdiction of the court.'

The *Harvard Research*, after an exhaustive investigation of State practice, came to the conclusion that 'a crime is committed wherever an essential element of the crime is accomplished',[2] and this conclusion was written into Article 3 of their draft convention which provided that:

> 'A State has jurisdiction with respect to any crime committed in whole or in part within its territory.'

Thus it is clear from the authorities that the objective application of the territorial principle is limited to those 'effects' which are direct, if not immediate, and which form a part of the *actus reus*; where, in the language of the older cases, the crime was 'consummated', viz. completed, in the territory claiming jurisdiction.[3] And, indeed, the same conclusion is required by the reason of the thing, for a different conclusion would permit a practically unlimited extension of the principle to cover almost any conceivable situation. It would be absurd, indeed, if an almost unlimited extraterritorial jurisdiction could be ostensibly based upon a territorial principle of jurisdiction.

Before leaving this matter, one other possible limitation on the objective application of the territorial principle must be mentioned. It has sometimes been said that it ought only to be applied to offences where the results were *intended* to be produced in the State claiming jurisdiction. This limitation was strongly pressed in the French argument on the *Lotus* case, but rejected in the majority decision.[1] The majority decision on this point was doubtless correct. The limitation of the test to cases of intention cannot be supported as a proposition of international law except by sparse and inconclusive authority.[2] Moreover, it assumes without justification that a distinction between intention and negligence, or perhaps between advertence and inadvertence, can be drawn in most cases with reasonable certainty and by tests which can be said to be part of the general principles of law. This proposition seems at least doubtful. In a complex case, of the antitrust type, for example, it may be extremely difficult to decide in fact how far the actual consequences of a complicated set of arrangements were intended or fortuitous.[3]

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[1] *P.C.I.J.* (1927), Series A, No. 10, p. 30.

[2] Loc. cit., p. 494. The Cambridge rules of the Institute of International Law, which are not, however, free from ambiguity, might seem to favour a wider rule; but these are *de lege ferenda*:

> 'Art. 1. La loi pénale d'un État régit toute infraction commise sur son territoire, sans réserve des exceptions consacrées par le droit des gens.
>
> Art. 2. La loi d'un État peut considérer une infraction comme ayant été commise sur son territoire aussi bien lorsqu'un acte de commission ou d'omission qui la constitue y a été perpétré (ou tenté) que lorsque le résultat s'y est produit ou devait s'y produire.
>
> Cette règle est aussi applicable aux actes de participation.' (*Annuaire* (1931) 2.)

[3] See also Bourquin, op. cit., p. 171: 'Assurément, la distinction entre les effets directs et les effets indirects d'un acte est une distinction fort complexe et fort subtile, ou le vrai sens des mots est parfois altéré, ce qui embrouille encore davantage le problème. Cependant la pratique jurisprudentielle permet d'acquérir une vue tout au moins générale et approximative de la portée que les pays anglo-saxons attribuent à cette distinction; et il nous semble qu'on peut assez exactement résumer leur pensée à cet égard en disant *que l'effet d'une infraction est direct quand il n'est pas simplement la suite ou la répercussion du crime, mais fait en réalité partie intégrale de l'activité criminelle elle-même; quand il lui est en quelque sorte con-substantiel et non pas simplement conséquent.*'

III

Jurisdiction in Antitrust Cases

We can now turn to some of the principal decisions of United States courts in cases where they have been asked to apply the sanctions of the antitrust laws in situations involving foreign companies.

The United States courts formerly applied the territorial principle in the strict common law form. The best-known statement of this principle as applied to the Sherman Act is in the decision of Mr. Justice Holmes in *American Banana Co.* v. *United Fruit Co.* in 1909.[4] The plaintiff complained that 'United', a competitor, had, as part of its monopoly policy, instigated the Costa Rican Government to seize both United's plantation and its railway link with the coast. He claimed threefold damages under section 7 of the Sherman Act. The Court decided that the defendant could not be held liable for the acts of a foreign sovereign government, even if those acts were instigated by him. Further, it was held that the defendant could not be liable before a United States court even for those actions of his in Costa Rica which had no connexion with the Costa Rican Government. With regard to these acts the Court said:[5]

> 'It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other States. It is surprising to hear it argued that they were governed by the Act of Congress. . . . But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the laws of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him

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[1] *P.C.I.J.* (1927), Series A, No. 10. See, however, the opinion of Lord Finlay, who relied on the decision of the English court in *R.* v. *Keyn*, (1876) 2 Ex. D. 63 where the Court by a majority rejected an invitation to apply the objective test to a case of manslaughter by collision at sea.

[2] *Harvard Research*, loc. cit., p. 501.

[3] Nevertheless, in the *Alcoa* case, discussed below, Judge Learned Hand thought an element of 'intention' necessary to found his jurisdiction.

[4] (1909) 213 U.S. 347.

[5] Pp. 355–6.

> according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other State concerned might justly resent.'

This is a classic statement of the common law understanding of the territorial principle. There was no mention in the case of the objective test of territoriality, which indeed was hardly relevant on the facts of the case.

But the United States courts showed very early that they regarded the objective application of the territoriality principle as a very flexible weapon in their hands. Within a few years of Mr. Justice Holmes's decision in the *American Banana* case we find the Supreme Court deciding that a steamship company was liable for a breach of the Immigration Act, 1907, which forbade the forcing of security and return passage money from aliens prior to transporting them to the United States; and this although the steamship company was German, the return fare had been collected in Bremen, and the transaction was lawful under German law. The aliens, the Court decided, had been unlawfully brought to the country, the defendant was then under a duty to take them back at his own cost, but instead of returning them their money he retained it with intent to secure their passage back to Bremen. 'This retention of the money, with such intent, was an affirmative violation of the statute.' Said Mr. Justice Lamer:

> 'The Statute, of course, has no extraterritorial operation, and the defendant cannot be indicted here for what he did in a foreign country. *American Banana Co.* v. *United Fruits Co.* But the parties in Germany could make a contract which would be of force in the United States. When, therefore, in Bremen the alien paid and the defendant received the 150 rubles for a return passage, they created a condition which was operative in New York. . . . If, as argued, the company did nothing in New York except to retain money which had been lawfully paid in Germany, the result is not different, because, under the circumstances, nonaction was equivalent to action.'[1]

It was inevitable that the elasticity thus introduced into the territorial principle should be deployed in antitrust cases, for combinations of the kind rendered illegal by the Sherman Act are frequently international, taking full advantage of the possibilities of corporation law to devise intricate networks of control which range easily across territorial frontiers;

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[1] *U.S.* v. *Norddeutscher Lloyd*, (1912) 223 U.S. 512. See also *Ford* v. *United States*, (1926) 273 U.S. 593 where British nationals, hovering on the high seas outside United States waters, were convicted of a conspiracy to defeat the Prohibition and Tariff Laws:

> 'The conspiracy was continuously in operation between the defendants in the United States and those on the high seas adjacent thereto, and of the four overt acts committed in pursuance thereof, three were completed and took effect within the United States. . . . In other words, the conspiring was directed to violation of the United States law within the United States by men within and without it and everything was done at the procuration and by the agency of each for the other in pursuance of the conspiracy and the intended illegal importation. In such a case all are guilty of the offense of conspiring to violate the United States law whether they are in or out of the country.' *Per* Taft C.J., at p. 620.

and yet the foreign corporation defendants are usually within reach of the necessary jurisdiction *in personam*, having in most cases branch offices run by subsidiary companies in the United States. Given in this situation the need in the common law tradition to argue in terms of the territorial principle, it is clear that a considerable development of the objective application of it could hardly be avoided.

As early as 1911, in *United States* v. *American Tobacco Company*,[1] the Supreme Court, reversing a decision of the Circuit Court, struck down an agreement 'executed in England' between an American combination and its British competitor, the Imperial Tobacco Company, ending a long tobacco and snuff war, by which agreement Imperial was to 'limit its business to the United Kingdom' and the American companies to limit their business 'to the United States, its dependencies and Cuba'. The agreement was, of course, entirely lawful under English law. Nevertheless, the Court felt the combination must be looked at as a whole for the purpose of testing its nature under the Sherman Act, and that the foreign corporations were subject to the jurisdiction in so far as they were co-operators in the combination. The objective test was not formulated in precise terms in the judgment, which, however, impliedly accepted the argument of the appellants that the circuit court decree 'should have commanded the observance of the anti-trust act by the foreign corporations so far as their dealings in the United States were concerned, and should have restrained those companies from doing any act in the United States in violation of the anti-trust act, whether or not the right to do the said acts was asserted to have arisen pursuant to the contracts made outside of or within the United States'.

In *United States* v. *Pacific and Arctic Railway & Navigation Co.*,[2] the Supreme Court made a decree against a price combination of American and Canadian railway and steamer companies. It was contended by the defendants that United States laws 'were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that our laws cannot be extended to control or affect the foreign carriage'. But the Court said: 'This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept.' The control sought by the defendants in their arrangement was 'to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.'[1]

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[1] 221 U.S. 106.

[2] 228 U.S. 87 (1913).

Again, in 1927, the Supreme Court in *United States* v. *Sisal Sales Corporation* distinguishing the *American Banana* case, said:

> 'Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States . . . complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties.'

The defendant was subject to the jurisdiction because he had 'brought about forbidden results within the United States'.[2]

Thus, all these earlier cases under the antitrust and tariff legislation exhibit a careful respect for the territorial principle of jurisdiction. Jurisdiction is admittedly exercised over foreign corporations and in respect of situations a constituent of which may be agreements made by foreigners abroad, but it is limited to what was performed and intended to be performed within the territory of the United States. It cannot be argued that this is other than a sensible and reasonable deployment of the objective territorial theory.[3]

The Alcoa *case and later*

A new and different note, however, is struck by the very important decision of the Court for the Southern District of New York in *United States* v. *Aluminium Company of America, et al.*,[4] a case involving, besides the American company (usually known as *Alcoa*), a British corporation called Aluminium Limited and other associated foreign corporations. The

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[1] *Per* Mr. Justice McKenna, 228 U.S. 87, 105.

See also *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), where the Supreme Court awarded treble damages in an action against agents of foreign shipping lines for charging discriminatory rates on shipments between New York and S. Africa in pursuance of an agreement made in London. The agents' activities in the United States territory were held a sufficient basis for the exercise of jurisdiction.

[2] 274 U.S. 268, 276. In so far as this judgment suggests that the *American Banana* case was concerned simply with the acts of 'another government at the instigation of private parties' it is, of course, inaccurate. Mr. Justice Holmes also considered the acts of the defendants themselves to be outside his jurisdiction. This, however, is not the only case where Mr. Justice Holmes's decision has been 'distinguished' by ignoring the most important part of it.

[3] It is put thus by an American commentator: 'The facts of these cases suggest a broader territorial view which takes into account the nature of present-day cartels and thus does not consider acts abroad as immune from regulation if they are part of a larger pattern involving some activities within the United States. Under such a theory, the *American Banana* case could still have validity, even though the Court in that case conceded that the conspiracy might have been entered into in the United States, since the principal act considered by the Court occurred abroad and any effects of that act upon American commerce were conjectural.' See *Harvard Law Review*, 69 (1956), p. 1455.

[4] 148 F. 2d. 416 (1944).

Court passed on agreements made in 1931 and 1936 between the foreign companies only, the United States company not being a party to either agreement. One of the main questions for the Court therefore to decide was how far, in the Sherman Act, 'Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it'. 'It is quite true', said Learned Hand C.J. delivering the judgment of the Court, 'that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "conflict of laws". We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.' Nevertheless, he went on to say: 'it is settled law—as "Limited" itself agrees—that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders; and these liabilities other States will ordinarily recognize'. Then the Court went on to elaborate its statement of the objective test in a passage which must be quoted in full:

> 'It may be argued that this Act extends further. Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in the country to treat such agreement as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they have had no effect upon them. That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here. We shall not choose between these alternatives; but for argument we shall assume that the Act does not cover agreements even though intended to affect imports or exports, unless its performance is shown actually to have had some effect on them. Where both conditions are satisfied, the situation certainly falls within such decisions as *U.S.* v. *Pacific and Arctic Railway & Navigation Co.*, 228 U.S. 87; *Thomson* v. *Cayser*, 243 U.S. 66, and *U.S.* v. *Sisal Products Co.*, 274 U.S. 268 (*U.S.* v. *Norddeutscher Lloyd*, 223 U.S. 512 illustrates the same conception in another field). It is true that in those cases the persons held liable had sent agents into the United States to perform part of the agreements; but an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell ingot.'
>
> 'Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.'

This is, indeed, a startling projection of the objective test of territoriality;

for in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners, provided only that the agreement was intended[1] to have repercussions and did in fact have some repercussions upon American imports or exports; and this though it is acknowledged in the judgment that such repercussions may be the result of 'almost any limitation on the supply of goods' in countries trading with the United States.

The *Alcoa* case gave new impetus as well as new direction to the antitrust prosecutions. In the *National Lead*[2] case the Court was able to qualify the arrangement as 'a conspiracy in the United States affecting American commerce, by acts done in the United States as well as abroad', but in the *Timken* case[3] (which, however, was principally concerned with a different point, i.e. whether the conditions of trade in foreign trade may make reasonable what would otherwise be a restraint of trade), the Court found that 'the fact that the cartel arrangements were made on foreign soil' did not 'relieve defendant from responsibility', for these arrangements 'had a direct and influencing effect on trade in tapered bearings between the United States and foreign countries'. The United States 'territory was clearly affected'.

In the important *General Electric* (incandescent lamp) case,[4] a District Court followed the *Alcoa* case lead, finding that an arrangement made abroad between foreign nationals, in which arrangement American companies participated but in which also the United States market was expressly excluded from the operative provisions, 'deleteriously affected' and 'aborted' competition in the American domestic market, and was therefore subject to the jurisdiction. They impliedly rejected a plea by one of the foreign defendants, the Dutch company of Philips, that 'the court should seize this opportunity to announce the rule that foreign corporations like Philips engaged in business abroad may enter into agreements among themselves or with American corporations or individuals freely and without fear of antitrust suits here, so long as what they do is not done wilfully to restrain United States trade and does not have a direct and substantial restraining effect upon it'. It was unsuccessfully claimed by Philips that

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[1] Or so the Court decided, but the 1931 agreement did not at any rate on the face of it take imports into the United States into account in fixing its production and distribution quotas; nor was there any reference to United States imports in the 1936 agreement. Judge Hand, however, held that restriction on production outside the United States evidenced intention to affect imports with the United States, and the burden was therefore on the defendants to prove there was no such intent. This burden they failed to sustain.

[2] *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), affirmed 332 U.S. 319 (1947).

[3] *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Chic. 1949), affirmed 341 U.S. 593 (1951). The defendant in this case was an American company.

[4] *United States* v. *General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949); final decree, 115 F. Supp. 835 (1953).

'a different test must be applied when considering the legality of acts of foreign corporations whose activities are wholly abroad, and *a fortiori* if such acts are done abroad than if Americans are involved'.[1] The Court answered this plea by saying that Philips knew or 'should have known' its activities 'were a substantial contribution to the scheme whereby the domination of General Electric over the United States market of incandescent lamps would be perpetuated and competition thwarted'.

The high-water mark of jurisdictional claims was possibly reached in the decision of Judge Sylvester Ryan in the Southern District Court of New York, in *United States* v. *Imperial Chemical Industries et al.*[2] Here the principal defendant, a British company with a subsidiary in New York, was party to an arrangement with the American firm of du Pont and others, which was found to be a conspiracy to restrain trade by dividing world markets, bolstered by an arrangement about patents which 'kept patented products manufactured in the United States out of the markets of Great Britain, and the like products manufactured in Great Britain out of the United States'. The law, said Judge Ryan, was 'crystal clear: a conspiracy to divide territories, which affects American commerce, violates the Sherman Act'. The final decree contained, *inter alia*, orders to the British company concerning its handling of British patents. 'As to this', said Judge Ryan, 'acting on the basis of our jurisdiction *in personam*, we are merely directing I.C.I. to refrain from asserting rights which it may have in Britain, since the enforcement of those rights will serve to continue the effects of wrongful acts it has committed within the United States affecting foreign trade of the United States. . . . It does not seem presumptuous for this court to make a direction to a foreign defendant corporation over which it has jurisdiction to take steps to remedy and correct a situation, which is unlawful both here and in the foreign jurisdiction in which it is domiciled.[3] . . . It is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States.'

Thus in this case the jurisdiction is taken to the extreme length of issuing directions to a foreign corporation concerning the disposition by it of property owned by it in its own country under its own law.[4] This, the judge recognized, might raise 'substantial legal questions' and that the effectiveness of such decrees 'depends upon the recognition which will be given to our judgment as a matter of comity by the courts of the foreign sovereign which has granted the patents in question'. The right to issue the directions, however, was claimed because the acts of the defendants had 'in part, been committed here and the result of their agreement has directly affected our trade and commerce'. Moreover, the Court was 'not restricted by the fact that what the joint companies may have done was or was not lawful in these countries where they are located. These actions, whether legal or not where committed, were pursuant to an agreement unlawfully made and consummated in part by acts of the defendants within our jurisdiction. . . . That these measures direct the defendants to do certain things the effect of which is felt or realized beyond our borders is immaterial.'

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[1] See 115 Fed. Supp. 835 (1953).

[2] 100 F. Supp. 504 (S.D.N.Y. 1951), final decree 105 F. Supp. 215 (S.D.N.Y. 1952).

[3] This, of course, was a misapprehension; there had been no illegality in English law.

[4] It is true, of course, that licences issued under patent rights lend themselves readily as a vehicle for enforcing division of markets, so that arrangements about exchange of patent rights are inevitably suspect to an antitrust court. See also *United States* v. *Holophone Co. Inc.*, 119 F. Supp. 114 (S.D. Ohio 1954).

The measures referred to included an order to I.C.I. to reassign to du Pont certain British patents under which British Nylon Spinners, another British company, held both exclusive licences and rights to the assignment of the patents. Nylon Spinners were not defendants in the action for they were not even subject to the *in personam* jurisdiction. But I.C.I. had a stock relationship interest in Nylon Spinners which, in effect, had been created by them jointly with Courtaulds Ltd. to exploit the patents. Accordingly, the Court concluded that Nylon Spinners did not hold its licences as an 'innocent party' and 'its rights were wholly subject to the inherent vices of the agreements through which they were acquired'.

This view was immediately tested in the English court where British Nylon Spinners sought and obtained an injunction restraining I.C.I. from complying with the American decree, and an order for specific performance of their contractual rights to assignment of the British patents; this contract, said the English Court of Appeal, being 'an English contract made between English nationals and to be performed in England, the right which the plaintiff company has may be described as its right under contract to have it performed, and, if necessary, to have an order made by the courts of this country for its specific performance'.[1] The plaintiff company had, at least, established a *prima facie* case for saying that 'it is not competent for the courts of the United States . . . to interfere with those rights or make orders, the observance of which by our courts would require that our courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights'. Lord Evershed M.R. said the case 'raised a somewhat serious question whether the order, in the form that it takes, does not assert an extraterritorial jurisdiction which the courts of this country cannot recognize notwithstanding any such comity'.[2] And again, referring to Judge Ryan's assertion that 'it was not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on trade of the United States', the Master of the Rolls observed: 'If by that passage the judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign Power effective to remove (as he said) "harmful effects on the trade of the United States", I am bound to say that, as at present advised, I find myself unable to agree with it.'[1]

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[1] *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries Ltd.*, [1953] 1 Ch. 19, 26. This was the application for an interlocutary injunction, which went to the Court of Appeal. For the trial of the action, in which specific performance was granted, see [1955] Ch. 37. Cf. also *Castriguo* v. *Imrie*, L.R. 4 H.L. 414.

[2] [1953] 1 Ch. 24.

The United States courts are, of course, not unaware of the dangers, in exercising this extremely wide extraterritorial jurisdiction, of actual collision with foreign courts. Thus, Judge Ryan in the *I.C.I.* case included in the court's decrees a saving clause which was seized upon with relief by Denning L.J. in the English case;[2] and this followed a precedent set in the decrees addressed to Messrs. Philips in the *General Electric* case. Such saving clauses doubtless prevent the embarrassment of actual collision between contradicting decrees, but they are also virtually an acknowledgement that United States law is sought to be applied and enforced within the territorial jurisdiction of another country.

The English decision in *British Nylon Spinners* v. *Imperial Chemical Industries* received considerable attention in America. It appeared for a moment, indeed, that in *Vanity Fair Mills* v. *T. Eaton Co. Ltd.*[3] the courts were turning away from the more extreme claims to extraterritorial jurisdiction. In refusing a remedy against a Canadian company for alleged infringement of the American plaintiff's Canadian trademark, even though the offence might be said to have affected American commerce, the District Court referred to the *Nylon Spinners* case and added:

> 'We in this country undoubtedly would be outraged if American companies having branches in foreign lands were faced with the possibility that the courts of all these lands would assume jurisdiction to determine the rights of the American company in its home land to trademarks, copyrights, or patents granted or registered under the laws of the United States.'[4]

These hopes, however, were disappointed in the *Holophone* case,[5] where the District Court had ordered an American corporation to terminate its exclusive licensing and marketing agreements with British and French corporations and moreover 'to use reasonable efforts . . . to promote the sale and distribution of its . . . products in foreign markets'. They were told to use for this purpose unmarked products or a new trademark in order to avoid violating the trademarks of their former associates. In this case the international law concerning the limits of extraterritorial jurisdiction was strenuously argued for the appellants; but the Supreme Court[1] affirmed the District Court's orders in a mere 'memorandum of affirmation'.

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[1] Ibid., p. 25.

[2] Denning L.J. said: 'It would be a serious matter if there were a conflict between the orders of the courts of the United States and the orders of these courts. The writ of the United States does not run in this country, and, if due regard is to be had to the comity of actions, it will not seek to run here. But, as I read the judgment of this United States court, there is a saving clause which prevents any conflict, because although Imperial Chemical Industries have been ordered to do certain acts by the United States court, nevertheless there is a provision which says that nothing in the judgment shall operate against the company for action taken in complying with the law of any foreign government or instrumentality thereof to which the company is for the time being subject. With that saving clause I hope there is no conflict between the orders.'

[3] 77 S. Ct. 96, 352 U.S. 871 (1956).

[4] 133 F. Supp. 522, 528.

[5] 119 F. Supp. 114 (S.D. *Ohio* 1954).

Use of the subpoena duces tecum

There is another respect in which the American courts have in the more recent cases come near to direct conflicts with foreign jurisdictions. The preparation of these major antitrust cases involves the assembling and examination of a mass of evidence, including the private papers and books of the defendant firms. In some recent cases the American courts have not hesitated to address orders for discovery to foreign firms through their American branches, requiring them to produce to the United States court documents situated in foreign territory. Thus, in the *Canadian International Paper* case,[2] the defendant Canadian corporation moved to quash an order for discovery of documents on the ground that they were not able to produce the books and records because a quorum of the Board of Directors, all residents in Canada, had passed a resolution in Montreal that the records be kept in the custody of the company 'and should in no case be allowed to be taken out of Canada'. The Court, however, held 'the corporation may not evade complying with the subpoena by a resolution of this character'. A direct result was the passing of The Business Records Probation Act,[3] which forbade removal of business records from Ontario unless authorized by 'Act of Ontario or of the Parliament of Canada'.

The American court adopted a somewhat more cautious attitude in the *Oil Cartel* case.[4] There, the defendants moved to quash a *subpoena duces tecum* because it called for the production of documents that are 'privileged and compliance might violate foreign law'. The British, Belgian and Netherlands Governments all made official protests. The British Minister of Fuel and Power, in a letter to the British company, said the Government required them not to produce 'any documents which are not in the United States of America and which do not relate to business in the United States', and a letter from the Foreign Secretary stated that this claim 'embraced a claim of sovereignty'. The Court having been satisfied that 'there is a true objection by the foreign sovereign and not a premature expectation by the innocent party', granted the notices to quash. The Anglo-Iranian Oil Company's motion (a portion of the shares in this company are, of course, held by the British Government) was granted on the astonishing ground that the Anglo-Iranian Oil Company was 'indistinguishable from the government of Great Britain', and hence entitled, the Court said, to foreign immunity from criminal suit.[1]

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[1] 352 U.S. 871 (1956). On the affirmation order to compete abroad the Court split 4 to 4. See Oliver in *American Journal of International Law*, 51 (1957), pp. 380 et seq.

[2] *In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co. et al.*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

[3] 1 Rev. Stat. of Ontario, 1950, Ch. 44.

[4] *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.B. 280 (D.D.C. 1952).

There is, of course, no reason in general principle why a court should not order an alien subject to its jurisdiction *in personam* to produce documents relevant to a case in which he is a party, no matter where he may choose to keep those documents. The objection in the antitrust cases is that the documents are required for a preliminary investigation which ranges outside the permissible limits of extraterritorial jurisdiction, and attempts to subject aliens in respect of their doings even in their own countries to a kind and scale of investigation which is quite unknown in any jurisdiction outside the United States.[2]

Presence of corporations in United States territory

There is one further aspect of antitrust jurisdiction which must be briefly mentioned in this survey. It is, of course, elementary that, however wide the extraterritorial jurisdiction of the United States courts may be, they cannot in fact exercise it unless the defendant is subject to jurisdiction *in personam*, i.e. can be said to be 'found' within United States territory. In deciding this question the courts have again tended, by piercing the corporate veil and tracing corporate association, to introduce a high degree of flexibility into their determinations. Thus, in the *Swiss Watch* case[3] it was said that the presence of a corporation within the jurisdiction was to be determined 'from a realistic appraisal of its overall business', including whether there is proof of 'continuous local activities'. The question was whether Swiss firms were brought within the jurisdiction by the activities of American companies. One such American company was found to have 'no independent business of its own'; 'the substance of corporate independence is not preserved and the subsidiary acts as an agent of the parent'. Two other defendants, however, both Swiss manufacturers, were found present in the jurisdiction 'by attributing to them the activities of their

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[1] The British and Belgian communications are reproduced in Whitney, *The United States Government and the Alleged International Oil Cartel* (1953). The Netherlands communication was impounded by the court as secret.

A new Netherlands 'Economic Competition Law' of 1956 (which still awaits the passing of further legislation before coming into operation) will forbid the production of certain documents to foreign courts except with the approval of the Government.

[2] See *R.C.A.* v. *Rauland*, [1956] 1 Q.B. 618 for an example of what Lord Goddard called 'a "fishing" proceeding which is never allowed in the English courts'.

[3] *United States* v. *Watchmakers of Switzerland Information Center Inc.*, 133 F. Supp. 40.

American affiliates'. 'Although in each case', the Court went on, 'the American parent has financial control of the Swiss subsidiary, the complaint alleges that it has voluntarily subjected itself as an affiliate to the restrictive dominance of the Swiss industry.' And speaking more directly with the question of corporate relationship in mind: 'It is unrealistic to speak in terms of corporate separation when both have agreed that acts by one corporation visit penalties upon the other... the two affiliates do not deal with each other as independents and it is a sufficient dissolution of the corporate barrier to make the acts of the one the acts of the other in determining "presence".'

Clearly this is Morton's Fork again. There is no end to the jurisdiction that could be brought into the territory with such a weapon.

The Attorney General's National Committee

It was partly the incipient collision with foreign jurisdictions, as well as some doubts whether the severe enforcement of antitrust law had an altogether beneficial effect on American foreign trade, which led to the setting up of an Attorney General's National Committee which reported in 1955.[1] Their recommendations, however, on the question of extraterritorial jurisdiction are sparse and tentative. They feel that the Sherman Act should only be applied to agreements made in concert with foreign firms, 'which have such substantial anticompetitive effects on this country's "trade and commerce with foreign nations" as to constitute unreasonable restraints'. Further that 'conspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to and actually do, result in anticompetitive effects on our foreign commerce'.[2] However, the question whether the anticompetitive effects are 'substantial' or not, though doubtless relevant to the question of policy, is not germane to the question whether the United States courts have or have not extraterritorial jurisdiction in this class of case.[3]

Remedies against extraterritorial application of antitrust laws

Assuming for the moment that the American courts may have in some measure given an extraterritorial force to antitrust laws which goes beyond what is permitted by international law, what remedies are available to an aggrieved State?

In the first place, there is the diplomatic remedy of protest available to the aggrieved State. If such protest were ineffective, then there would be a dispute to which the normal pacific procedures of international law would be appropriate.[4]

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[1] See above, p. 146, n. 1.

[2] See p. 76 of the *Report*.

[3] A note, however, added by one member is more to the point: that substantial effects must mean 'anticompetitive effects' which are *direct* as well as substantial.

[4] It is interesting to surmise whether, supposing such a case were brought before the World

On the other hand, a State is under no obligation to insist upon all its rights. A government may well decide that, although it would in a given case have a right of complaint, it does not wish to exercise it, whether for political reasons or perhaps even because it approves in principle a particular aspect of antitrust. Such adjustments in the relationship between States are by no means always made by treaty; they may equally well be the result of tacit acquiescence. To this extent the cautious and qualified feelers put out into other territories by the American courts[1] may be regarded in some measure as a reconnaissance. It follows that it is desirable from every point of view that Governments which do not welcome the too-near approach of antitrust decrees should make their views known whenever occasion arises.

However, the question may arise in a different way. The extraterritorial orders in antitrust decisions may result in actual collision with another system of municipal law. A defendant may have been required to break a contract which is enforceable in his local law,[2] or to infringe patent rights existing in the local law,[3] or to produce documents protected by official secrets legislation.[4] In some such way a municipal court may be compelled to decide what respect is to be paid by it to a decision of a United States court.

In such a situation a municipal court will naturally turn in the first instance to its system of private international law. An English court might have to consider, for example, whether the foreign law it is asked to take into account belongs to the class of penal laws which an English court will not enforce;[5] or on the other hand, it may have to consider the relevance of the principle that the courts will not enforce an agreement to break the law of a friendly country.[6]

With private international law as such we are not now concerned. There are, however, two links here between it and public international law. Firstly, although private international law is municipal law, yet in matters of jurisdiction it stems from the law of nations[7] and should at least not

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Court, the United States would claim that the matter was 'domestic' within the meaning of its 'automatic' reservation of domestic matters, as defined by the United States.

[1] See, e.g., above, p. 169, n. 2.

[2] *British Nylon Spinners* v. *Imperial Chemical Industries*, above.

[3] The possibility is foreseen in *U.S.* v. *Holophone Inc.*, above.

[4] *In re Investigation of World Arrangements*, above.

[5] *Folliott* v. *Ogden*, (1789) 3 T.R. 726; *Wolf* v. *Oxholm*, [1817] 6 M. & S. 92; *Banco de Vizcaya* v. *Don Alfonso de Bourbon y Austria*, [1935] 1 K.B. 140.

See also Cheshire, *Private International Law* (5th ed., 1957), at p. 135: 'The concern of private international law is with private, not public claims, and one of the best established principles in England is that the penal laws of foreign countries are strictly local and that they effect nothing more than they can reach by virtue of their own authority.'

[6] *Foster* v. *Driscoll*, [1929] 1 K.B. 470; *Regazzoni* v. *K.C. Sethia (1944) Ltd.*, [1956] 2 All E.R. 487. Cf., however, *Trinidad Shipping and Trading Co.* v. *G. R. Alston & Co.*, [1920] A.C. 888 (P.C.).

[7] See Rheinstein, *University of Chicago Law Review*, 22 (1955), p. 775 et seq.

be at variance with it. Secondly, a municipal court—certainly an English court—will in a proper case apply the rules of public international law;[1] though again it must be remembered that a State is not required to insist on its fullest possible rights and in matters such as jurisdiction international law will not of itself enlarge the area of municipal law.[2] In particular relation to English cases, the question which law an English court is applying in a given case—international law or conflict of laws—is not made the easier by the habit of English judges of referring indifferently to public international law, private international law, and even mere consideration and courtesy, as 'comity', or 'the comity of nations'. But the ambiguity of the term 'comity' is comparatively innocuous in this kind of case, for at the point where there is a contradiction between United States and English law it is likely that English courts will always appeal to the territorial principle. As Devlin J. said in a recent case, with regard to the law governing property in England, 'if extraterritorial effect is given to foreign property legislation, it can only be at the expense of English law affecting the same subject matter.'[3] And again,

> 'No foreign legislation could have any effect at all unless the common law, by which ordinarily rights of property are governed, was subordinated to it, I know of no authority for distinguishing in this respect between the common law and statute.'[4]

Whether that is regarded as an application of the conflict principle of the *lex situs*, or of the territorial principle of international law matters not, for to this extent they are identical.

It is in any case wrong to assume—as seems to be the assumption of the saving clauses found in the decrees in the *General Electric* and *Alcoa* cases—that the exercise of extraterritorial jurisdiction is always permissible up to the point where there is an actual clash or possible clash with a foreign court: unless, indeed, we are to allow that public international law has nothing to say on the question of jurisdiction, that jurisdiction is governed solely by private international law, and discoverable only empirically by municipal litigation. But this is not an answer States would be likely to accept, and in any case it seems to be excluded by the frequent appeals by United States courts to the objective test of territoriality as a principle of international law. It is reasonable to conclude, therefore, that the proper bounds of extraterritorial jurisdiction may be reached or exceeded, irrespective of the accident of municipal litigation: that, for example, Judge Ryan's decree addressed to I.C.I. might have been contrary to international law even if I.C.I. had not by English contract disposed of the patents to British Nylon Spinners.

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[1] *The Cristina* [1938] A.C. 485.

[2] *R.* v. *Keyn* (1876), 2 Ex. Div. 63, 239.

[3] *Bank voor Handel en Scheepvaart N.V.* v. *Slatford and Another*, L.R. [1953] 1 Q.B. 248, 258.

[4] Ibid., p. 259.

IV

Conclusions

There is no doubt that in some of the antitrust cases of recent years the United States have pushed their claims to extraterritorial jurisdiction to extreme limits. Have they gone beyond what is permitted in international law?

The objective application of the territorial principle is certainly now part of the general principles of law recognized by civilized nations; and there seems to be no good reason why it should not be used in the enforcement of antitrust laws. The United States courts cannot be expected to refuse jurisdiction over agreements which primarily intend, and produce, illegal activities within United States territory. But it may, with respect, be submitted that the *Alcoa* pattern of case goes too far when 'jurisdiction' is assumed over foreigners' foreign agreements, merely because it has been possible to allege some 'effects' on United States imports or exports, and because the agreement would have been illegal if made in the United States. This kind of jurisdiction seems to offend in two ways. First, since this jurisdiction is rested by the court on the objective test of *territorial* jurisdiction, it must be kept within the confines of that concept. But to extend that concept to cover effects in the sense of mere repercussions—sometimes repercussions ancillary to the purpose of the scheme as in the *Alcoa* case—is not only to extend it beyond the limits covered by authority but also to reduce it to an absurdity. Practically unlimited extraterritorial jurisdiction cannot reasonably be founded on a territorial principle. Secondly, even allowing a most liberal view of the limits of *extra*territorial jurisdiction, these cases still offend against the ultimate limit because they are an attempt to export into other countries and to make operate there what are after all peculiarly American political notions.

ESTOPPEL BEFORE INTERNATIONAL TRIBUNALS AND ITS RELATION TO ACQUIESCENCE

By D. W. BOWETT M.A., LL.B., PH.D.

THE rule of estoppel, whether treated as a rule of evidence[1] or as a rule of substantive law,[2] operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.[3] The basis of the rule is the general principle of good faith and as such finds a place in many systems of law;[4] the description of this rule as an Anglo-American rule is misleading in so far as it suggests that its essentials are peculiar to the English and American legal systems. It may be true that in those systems the rule has developed refinements which find no place in the 'rough jurisprudence' of international courts,[5] but the essentials of the rule are far more general, and their acceptance into the jurisprudence of international tribunals will be apparent from the following pages.

For the sake of clarity and of indicating the precise nature of estoppel (and therefore the scope of this article) it may be useful to distinguish certain principles which have effects similar to estoppel. The first of these principles is that of *res judicata*, whose reception into international jurisprudence is now beyond question.[6] The basis of this principle is a final decision of a court of competent jurisdiction upon questions directly in issue between parties to an action, and its effect is to preclude those parties or their privies from raising those same issues before another court in a subsequent action. The Permanent Court of International Justice has said that 'recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of the award are definitive and obligatory'.[1] The rationale of the principle is expressed in the maxim *interest rei publicae ut sit finis litium*: it is essentially a rule of common sense and public policy that litigation should have finality. It follows, therefore, that, though in its effect of precluding a party from raising certain issues before a court it is remarkably similar to the preclusion of an estoppel, the principle of *res judicata* is distinguishable from estoppel. The rationale of estoppel is expressed in the maxim *allegans contraria non audiendus est*; its essential aim is to preclude a party from benefiting by his own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party. *Res judicata*, in contrast, is not concerned with inconsistency in the party's conduct: indeed, there could be nothing more consistent than the attempt to raise before a court the very same issues which had been finally determined by a previous court. The reason for preventing this course of action is based on the necessity to put an end to litigation, not, as with estoppel, to avoid inconsistency. Moreover, whereas the source of *res judicata* is the decision of a tribunal, the source of estoppel is the conduct or statements of the parties. This indicates at once the wider ambit of the doctrine of estoppel, for, though the plea of estoppel is invariably made in the course of judicial proceedings, it is not confined to conduct or statements made in the course of judicial proceedings.

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[1] Friede, 'Das Estoppel-Prinzip im Völkerrecht', *Z.f.a.ö.R.v.V.* 5 (3), (1935), pp. 517–45; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 203.

[2] This is the modern treatment in American municipal law; see Wigmore on *Evidence*, 3rd ed., s. 2589; and in English municipal law; see *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National* (*West Indies*) *Steamships Ltd.* [1947] A.C. (P.C.) 46 at p. 56.

[3] For an early and restrictive definition see *Pickard* v. *Sears* (1837) 6 Ad. & E., p. 469 *per* Lord Denman C.J. at p. 474; and generally Halsbury, *Laws of England*, 3rd ed., vol. xv, p. 168 et seq.; D'Argent, *La Doctrine de l'estoppel* (1942), *passim*; Phipson, *The Law of Evidence* (1952), pp. 704–10; Strode, *Law of Estoppel* (1923), *passim*. For definitions before international tribunals see opinion of the American Commissioners in the *Santa Isabel Claims* (U.S./Mex.), Special Claims Commission, *American Journal of International Law*, 26 (1932), p. 196.

[4] Lauterpacht, op. cit., p. 204, draws illustrations of similar principles from various municipal systems, as does Friede, loc. cit., p. 531. The best jurisprudential analysis of the basis of estoppel is by D'Argent, op. cit., p. 228 et seq. Cheng, *General Principles of Law* (1953), pp. 141–9, deals with the principle *allegans contraria non est audiendus* and shows its wide application before international tribunals: the present writer is indebted to Dr. Cheng's detailed treatment.

[5] Hall, *International Law*, 7th ed., p. 349 (n. 1).

[6] See Cheng, op. cit., ch. xvii, *passim*; *Pious Fund* case (1902), *Scott's Hague Court Reports*, pp. 3–5; *Trail Smelter* arbitration (U.S./Canada), *U.N.R.I.A.A.* (United Nations Reports of International Arbitral Awards), vol. 3, p. 1905 at p. 1951; Merignhac, 'De l'autorité de la chose jugée en matière de sentence arbitrale', *Revue générale de droit int. public*, 5 (1898), pp. 606–25; Limburg, 'L'Autorité de la chose jugée des décisions des jurisdictions internationales', *Recueil des Cours*, 30 (1929), pp. 523–618.

The second principle which in its effect is somewhat similar to estoppel is that by which, in cases of doubt as to the meaning of an agreement, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning. This principle has been accepted by international tribunals and is now well recognized,[2] although there is room for argument whether this is a rule of construction or a rule of evidence. Sir Gerald

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[1] *Société commerciale de Belgique* case, *P.C.I.J.* (1939), Series A/B, No. 78, p. 175.

[2] Advisory Opinion on the *Competence of the I.L.O.* (*P.C.I.J.*, Series B, No. 2, pp. 40–41); Advisory Opinion on the *Frontier between Iraq and Turkey* (ibid., No. 12, at p. 24); Case of the *Brazilian Loans* (ibid., Series A, Nos. 20/21, p. 119); 'Chamizal arbitration', *American Journal of International Law*, 5 (1911), p. 805; the *David J. Adams* (U.S./G.B.), *Annual Digest, 1919–1922*, No. 239; *Chamberlain and Hookham Ltd.* v. *Solar Zahlerwerke* (G.B./Germ.), ibid., No. 249. See also British Prize Court decisions in *Les Quatres Frères* (1778), Hay and Marriott, 170, 172; *The Vrijheid No. 1* (1778), ibid., 188, 193; *The Franciska* (1855), Spinks' *Ecclesiastical and Admiralty Cases*, 113, 150. For U.S. decisions see *Pigeon River Development* v. *Charles W. Cox Ltd.*, 291 U.S. 138, 157–161 (1934); *U.S.* v. *Eighteen Packages of Dental Instruments*, 230 Fed. 564, 569 (C.C.A. 3d, 1916), and generally McNair, 'L'Application et l'interpretation des traités d'après la jurisprudence britannique', *Recueil des Cours*, 43 (1933), 251 at pp. 264–7; Ehrlich, 'L'Interprétation des traités', ibid., 24 (1928), pp. 34–39.

Fitzmaurice, in an article in this *Year Book*,[1] illustrated the application of the rule in recent decisions of the International Court and reached the conclusion that 'it is a question of the probative value of the practice of the parties as indicative of what the treaty means',[2] in other words a rule of evidence. The question which it is relevant for us to consider is whether or not this rule is an application of the rule of estoppel; for it is possible to construe the conduct of the parties as, in effect, estopping them from attributing to the agreement a meaning other than that in the sense of which they have interpreted it by their conduct. On analysis, however, this rule is distinct from estoppel. The purpose of the rule is to assist in ascertaining the intention of the parties *at the time of the agreement* and, therefore, since this is the relevant time, any reliance by one party upon the conduct of the other after that time is irrelevant.[3] Yet, without this reliance by the one party on the statements or conduct of the other it is impossible to think in terms of an estoppel. Moreover, as the International Court in its Advisory Opinion on the *International Status of S.W. Africa*[4] has pointed out, the interpretations placed upon legal instruments by the parties to them are not and cannot be conclusive as to their meaning: they lack the binding effect which is characteristic of the true estoppel. Further, the conduct of the parties will generally be based upon a general concurrence in the interpretation it involves between the parties to the agreement, so that the position is not akin to the situation found in estoppel where one party assumes responsibility towards the other for a statement of fact: indeed, in the majority of cases, the conduct will relate not to a statement of fact (with which estoppel is concerned) but to an interpretation of the rights and obligations of a party to the agreement.

Before turning to the forms of estoppel in international law a preliminary word might be said on the distinction between one form of estoppel known as collateral estoppel (sometimes issue estoppel or estoppel by record)[5] and *res judicata*. In the Anglo-American legal systems, and in international law too, *res judicata* presupposes identity of parties, object and cause:[1] the effect of *res judicata* is to bar the entire claim which shares identity in these three respects with a previous claim. In those cases where this identity is not present, as, for example, where the claimant in the second action proceeds upon a different cause of action, *res judicata* cannot apply. However, in English and American municipal law the notion of collateral estoppel is used to preclude the claimant from re-raising issues identical to those determined in a previous case between the same parties: the bar is partial, not complete, and the claimant is prevented from re-arguing only certain issues, not his claim as a whole. In reality this notion is one of partial *res judicata* and should be so treated by international tribunals. The reason why this notion is treated as estoppel rather than *res judicata* in English and American municipal law is an historical one;[2] it lies in the extreme formalism of the early systems of pleading and need not obscure the fact that the doctrine, in effect, has more kinship with *res judicata* than with estoppel. Its basis is *finis litium*, not the avoidance of inconsistency. Its advantage is that it prevents unnecessary litigation whilst at the same time conceding to a claimant his right to have any new cause of action adjudicated: as such it is a notion which international tribunals might usefully adopt.

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[1] 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', this *Year Book*, 28 (1951), p. 1.

[2] Ibid., p. 21, relying on the application of this principle in the Advisory Opinion on the *International Status of S.W. Africa* (*I.C.J. Reports*, 1950, at p. 135); Advisory Opinion on *Admission to Membership* (ibid., p. 9); *Corfu Channel* case (Merits), ibid., 1949, p. 25; the Dissenting Opinion of Judge Read in the *Asylum* case, ibid., 1950, pp. 323–4.

[3] Indeed, if the subsequent conduct did 'estop' the parties it would have to amount to a subsequent agreement upon a particular interpretation of the original terms or even a variation of those terms: but estoppel would be inappropriate here for the binding force of the subsequent agreement or variation would rest upon the fact of agreement, which has nothing to do with estoppel. See 'Harvard Research in International Law, Draft Convention on the Law of Treaties', *American Journal of International Law*, 29 (1935), Supp., p. 653, at p. 966, Comment.

[4] *I.C.J. Reports*, 1950, at p. 135.

[5] See 'Developments in the Law of Res Judicata', *Harvard Law Review*, 65 (1951–2), p. 820 et seq.; U.S. Restatement, (1942), Judgments, s. 68 Comment (*a*); Halsbury, op. cit., p. 181 et seq.

It is not apparent, however, that this distinction between strict *res judicata* and partial *res judicata* (collateral or issue estoppel) has been specifically recognized by international tribunals. In the *Delgado* case[3] there had been a claim in 1876 for 'the seizure and detention of Mr. Delgado's property and the damages consequent thereto', and this claim had been adjudicated on its merits. In 1881 a second claim was brought for 'the value of the property' and the 'value of the net annual revenues for ten years'; despite the appearance of this second claim as a separate cause of action from the first, the Umpire held the matter was *res judicata*. However, the Umpire allowed to proceed a part of this second claim which was founded upon a decree of the Spanish government in 1873, and which had not been before the Umpire in 1876—scarcely reconcilable with the complete preclusion of the *res judicata* doctrine.

The nearest example of a tribunal's recognition of the distinction between the total bar of *res judicata* and the partial bar of issue estoppel is to be found in the *Haya de la Torre* case[4] in which the International Court took the view that the precise issue of whether or not there was a legal obligation to surrender the refugee was not decided in the previous *Asylum* case;[1] it said:

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[1] *Trail Smelter* arbitration, *U.N.R.I.A.A.*, vol. 3, p. 1951 and the authorities there cited.

[2] *Harvard Law Review*, 65 (1951–2), p. 820; Millar, 'The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law', *Michigan Law Review*, 39 (1940), pp. 8–9; for the origins of a similar rule in German medieval law see Engelmann, *History of Continental Civil Procedure* (1927), p. 149.

[3] Moore's *International Arbitrations*, vol. iii, p. 2196.

[4] *I.C.J. Reports*, 1951, p. 71.

> 'The question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new. . . . There is consequently no *res judicata* upon the question of surrender.'[2]

Yet, even here, the recognition is not explicit for there was no need to distinguish this issue from any other issue raised in the later case which had in fact been decided in the earlier case.

It is submitted that much might be gained by a clear recognition by international tribunals of this distinction between the total bar of *res judicata* and the partial bar of collateral or issue estoppel. Let us suppose State A claims for damage to certain property belonging to one of its nationals in State B's territory and alleges the vicarious liability of State B for the acts of rioters; this claim is dismissed on the basis that there was no vicarious liability upon State B. In a subsequent claim State A claims for damage to other property, but occasioned in the same riots, and alleges both vicarious responsibility for the acts of the rioters and original responsibility upon State B for authorized acts of its armed forces. Clearly, for the court to apply the *res judicata* principle to the second claim would be unjust, for it would preclude State A from raising quite distinct issues from those previously determined. The most that ought to be done would be to apply the rule of collateral or issue estoppel so as to preclude State A from raising again the issue of vicarious responsibility.

For the purposes of the present paper, however, it may properly be assumed that estoppel rests upon the statements or conduct of the parties, and it is on the basis of this assumption that the various different forms of estoppel will now be examined.

(1) *The Forms of Estoppel*

In English municipal law there are three forms of estoppel: estoppel by record (otherwise known as collateral or issue estoppel), estoppel by deed[3] and estoppel in pais.[4] With the first we have already dealt in suggesting that its recognition would promote justice before international tribunals more than an unwarranted or inexact extension of the concept of *res judicata*. The second form of estoppel is one which is based upon the especial sanctity of a deed in English law, with the result that parties (and their privies) are bound by statements of fact contained in a deed which is their act. It will be submitted presently that in international law a similar sanctity is attached to treaties and other engagements in written form. The third form of estoppel is really estoppel by conduct, and this, too, has its analogy in international law.

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[1] *I.C.J. Reports*, 1950, p. 266.

[2] Ibid., 1951, p. 80. See generally on this problem Cheng, op. cit., pp. 343–7.

[3] Defined for the purposes of English law as 'a formal document on paper or parchment duly signed, sealed and delivered (Wharton's *Law Lexicon*, 14th ed., p. 308). In both its forms, as an indenture between two or more persons, and as a deed-poll made by a single person as a binding declaration, the deed has analogies in international law, i.e. the treaty and the unilateral declaration.

[4] Halsbury, op. cit., pp. 168–256.

(*a*) *Estoppel by treaty, compromis, exchange of notes, or other undertaking in writing*

Without suggesting that an obligation undertaken by a State and evidenced in writing is essentially different from an obligation undertaken in some other way,[1] it would seem that the evidence in writing distinguishes this type of undertaking from others, for it is to this evidence that courts will, in the first instance, resort to ascertain the meaning of any given undertaking. The maxim *pacta sunt servanda* illustrates the sanctity of the obligations: it is supplemented by the doctrine of estoppel in that statements of fact which condition and render meaningful these obligations are, by that doctrine, deemed to be binding on the parties to the agreement. The analogy suggested above is with that type of estoppel known to English law as estoppel by deed.

In the *Pious Fund* case,[2] the United States and Mexico had agreed by treaty that in those territories ceded by Mexico to the United States, residents wishing to retain Mexican citizenship must elect to do so, and those failing so to elect and remaining in the ceded territory should be considered to have elected to become citizens of the United States. In an arbitration in 1875, before Sir Edward Thornton as Umpire, the question arose of the nationality of the Roman Catholic Church in Upper California, part of the ceded territory; the Umpire stated:

> 'It has not been shown that the Roman Catholic Church in Upper California had declared any intention of retaining its Mexican citizenship and it can not but be concluded that it had elected to assume the citizenship of the United States. . . .'[3]

The effect was, therefore, to estop Mexico from contesting the character of the Church as a United States national since the statement in the treaty was binding upon her.

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[1] See McNair, *Law of Treaties* (1938), p. 47; Hackworth, *Digest of International Law*, vol. v, p. 31. The *Report on the Law of Treaties* (A/CN. 4/63) of 24 March 1953 presented by Lauterpacht as rapporteur to the International Law Commission at its Fifth Session, Articles 1 and 2, together with comment, provide an exhaustive analysis of the different forms which engagements may take.

[2] Scott's *Hague Court Reports*, p. 3: this should not be confused with later decision of the Hague Tribunal in 1902 dealing with the same case but concerned with a question of *res judicata*, not estoppel as we are now treating it.

[3] Ibid., p. 49. McNair, op. cit., p. 126 cites the Report of the Law Officers of 2 June 1877 as giving an instance of estoppel by treaty: there the Law Officers advised that, by the Treaty of Washington, Great Britain had impliedly admitted the abrogation of certain former rights.

In the *Eastern Greenland* case[1] the Danish contention was that various bilateral[2] and multilateral[3] treaties, to which Norway was a party and which described Greenland as a Danish colony or as part of Denmark or by which Denmark was allowed to exclude Greenland from the operation of the agreement, precluded Norway from contesting Danish sovereignty over Greenland. This contention was upheld by the Permanent Court.[4]

It is, of course, clear that an estoppel will normally have effect only between the parties to the treaty which contains the representation. A Report by the Queen's Advocate dated 17 April 1857[5] dealt with this general question whether an estoppel can arise between *A* and *B* from a statement contained in a treaty between *A* and *C*. The point had then arisen whether a treaty with the United States in which a clause admitted that certain islands were part of the Republic of Honduras would preclude Great Britain from insisting upon certain concessions before making a similar admission in another treaty (till then unratified) with Honduras. The Queen's Advocate replied that in strict law the admission to the United States could not avail Honduras. The only exception to this rule (which is more part of the general rule of estoppel than an exception) is that an estoppel could both benefit and bind States in privity with the original contracting parties. For example, where in a treaty between *A* and *B* an admission is made as to the extent of *B*'s territory, *C*, a State in succession to *B*, could treat this as an estoppel against *A* or a State in succession to *A*.

One form of agreement particularly relevant to the doctrine of estoppel is the compromis which forms the basis of a tribunal's jurisdiction over a dispute. Statements of fact contained in the compromis will, if their meaning is clear, estop the parties from contesting those facts before the tribunal: as Witenberg has said: 'on ne peut, en effet, ni plaider ni prouver à l'encontre du compromis'.[6] In the *Venezuelan Preferential Claim*[7] Venezuela had, in February 1903, signed separate protocols with Great Britain, Italy and Germany in which the justice of these countries' claims against Venezuela was admitted and the customs revenues of two Venezuelan ports allocated to the purpose of satisfying these claims. These same protocols were in turn incorporated in the compromis of 7 May 1903, which provided for the submission of the claim of the allies to preferential treatment to arbitration by the Hague Tribunal. Great Britain contended that Venezuela was estopped by the terms of the compromis:

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[1] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147.

[2] I.e. the Commercial Treaty of 1826.

[3] I.e. the Universal Postal Conventions of 1920, 1924 and 1929.

[4] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 70–71. See also the view of the British Government that by the Preamble to the Postal Convention of 1869 describing Honduras as a British 'Colony', a Convention signed by the United States, the United States was precluded from denying that Honduras was subject to British sovereignty: cited McNair, op. cit., p. 260.

[5] Cited McNair, op. cit., pp. 345–7.

[6] Witenberg, 'Théorie des preuves devant les jurisdictions internationales', *Recueil des Cours*, 56 (1936), at p. 26.

[7] The Venezuelan Arbitration before the Hague Tribunal, 1903, *Proceedings of the Tribunal* (U.S. Sen. Doc. 58th Congress, 3rd Session), vol. vii; the case is extensively cited by Lauterpacht as an instance of estoppel in *Private Law Analogies*, pp. 205, 253–4.

> 'The protocol is itself recited in the compromis of the 7th May—it is incorporated in it. Now, according to the first article of the protocol, the justice of the British claims is admitted, and it is from the compromis alone that the tribunal derives its jurisdiction. The compromis recites the protocol. It was in consideration of the admission contained in the protocol of the justice of the British claim that the blockade was raised and the Venezuelan vessels restored. It therefore would be . . . contrary to the most elementary and fundamental principles of jurisprudence to allow a power which was a party to this compromis reciting the protocol, which itself contains the formal admission on the strength of which the compromis was signed . . . to deny . . . the truth of the formal admission so contained in the protocol. . . . If a document contains an admission on the strength of which stipulations in the document are made, then the party signing the document is estopped from denying the truth of that admission.'[1]

It is, of course, obvious that to create an estoppel the words must be clear. In the *Salem* case[2] the compromis referred to Salem as an American citizen: the question then arose whether, as the United States contended, this estopped Egypt from contending otherwise, or whether, as Egypt contended, this was a fact capable of argument before the arbitral tribunal since upon it rested the juridical basis of the United States' claim. The tribunal took the view that the strict grammatical construction of the phrase was not the only possible construction, for the phrase 'can also be read to mean that by the words "American citizen" the juridical basis for the claim for damages is indicated, and as the claim is disputed between the high parties in its entirety the investigation of the validity of this basis would also fall under the jurisdiction given by them to the Arbitral Tribunal'. Accordingly, once this ambiguity had been accepted, the Tribunal referred to the preliminary correspondence between the parties which confirmed them in the view that the admission of Salem's American nationality had been only for the purpose of a re-submission of Salem's case to the Egyptian Court of Appeals: the matter was, therefore, arguable before the arbitral tribunal.

(*b*) *Estoppel by conduct*

Representations of a state of fact may be made expressly or impliedly where, upon a reasonable construction of a party's conduct, the conduct presupposes a certain state of fact to exist. Assuming that another party to whom the statement is made acts to its detriment in reliance upon that statement, or from that statement the party making the statement secures some advantage, the principle of good faith requires that the party adhere to its statement whether it be true or not. It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of fact, or as a necessary assumption of the risk of another party acting upon the statement. Witenberg has said:

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[1] Speech of Mr. Arthur Cohen, pp. 1259–69.

[2] (Egypt/U.S.A.) January 1931: *U.N.R.I.A.A.*, vol. ii, at p. 1180.

> 'Cependant, de toutes les formes que revêt l'estoppel se déduisent, comme principes communs, d'une part la responsabilité des apparences créées, d'autre part, l'obligation pour celui qui agit d'assumer le risque des réactions que son activité a pu normalement provoquer chez lui.'[1]

In essentials, however, the principle of good faith lies behind the responsibility and the risk. It is this principle of good faith which gives rise to the term 'equitable estoppel' to describe this form of estoppel, but equity in this connexion denotes, not a departure from established rules of international law,[2] but the basis of good faith upon which so many of those substantive rules rest. The American Commissioner in his Conclusions in the *Santa Isabel Claims*[3] said:

> 'The modern rule is: equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.'[4]

In that case, dissenting from his fellow Commissioners, he concluded that Mexico was estopped from denying responsibility for the acts of the bandit Villa. The estoppel rested, in his view, partly on the convention by which Mexico agreed to submit these claims to arbitration and which stated that all claims should be decided 'in accordance with the principles of justice and equity', and partly upon the conduct of Mexico's representatives. The President, Carranza, had extended a guarantee of protection and safety to the American citizens who were killed by Villa, and General Obregon, in command of the regular Mexican forces, had given a similar offer of protection.

The representation of fact must be unequivocal in the sense that it can reasonably support the meaning attributed to it by the party raising the plea of estoppel: and that party must satisfy the court that it understood the statement to have that meaning. In the *Eastern Greenland* case,[1] Denmark contended that, in effect, Norway was precluded from contesting Danish sovereignty over Greenland by the Ihlen declaration of 22 July 1919; this was the reply of Mr. Ihlen, the Norwegian Minister of Foreign Affairs, given orally to the Danish Minister. The Permanent Court declined to accept this view, saying:

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[1] 'L'Estoppel. Un aspect juridique du problème de créances américaines', *Clunet* (1933), vol. lx, p. 529 at p. 532.

[2] See the detailed discussion of the relation between equity and law in *The Cayuga Indians* (1926) U.S./G.B. Claims Arbitration: Hudson, *Cases on International Law* (1929), p. 1283: 'general principles of justice as distinguished from any particular system of jurisprudence or the municpal law of any state' is a description we should accept.

[3] U.S./Mex. Special Claims Commission' in *American Journal of International Law*, 26 (1932), p. 196.

[4] Ibid., at p. 196.

> 'A careful examination of the words used and of the circumstances in which they were used, as well as of the subsequent developments, shows that M. Ihlen cannot have meant to be giving there and then a definitive recognition of Danish sovereignty over Greenland, and shows also that he cannot have been understood by the Danish Government at the time as having done so.'[2]

The Court did, however, regard the Ihlen declaration as constituting an engagement obliging Norway in the future to refrain from occupying any part of Greenland.[3]

Two cases concerning the effect of the conduct of individuals on their claim of nationality may be cited to illustrate further the principle that an estoppel will only lie when the conduct is unambiguous in its representation of fact. In the *Sharpe* case[4] before a British-American Commission, the United States argued that by exercising voting powers in the United States the claimant had estopped himself from claiming British nationality. Upon proof that voting was not confined to citizens, the Tribunal refused to treat this act as unambiguous and creating the binding estoppel for which the United States contended: at most it could afford strong evidence of naturalization. In contrast, in the *Canevero* case[5] before the Permanent Court of Arbitration, the claimant's many acts of citizenship, especially in standing as a candidate for the Senate where none were admitted except Peruvian citizens, enabled Peru to regard the claimant as a Peruvian citizen: the acts were, in this case, unequivocal in their implication.

The representation involved in a course of conduct must, apparently, be made to or directed to the party which pleads the estoppel: a party cannot rely upon statements which are not addressed to it and which are not intended to or likely to affect its course of action.[1] Hence, although occasionally cited as an illustration of estoppel,[2] the *Croft* case[3] is not properly construed as a case of estoppel. Great Britain argued that Portugal was estopped from denying the truth of the British allegations of a denial of justice since Portugal had, by a decree in 1851, described the attitude of the Portuguese administrative organs (whose acts were called in question) as a denial of justice. Yet, since this was a decree submitted to the Portuguese Council of Senate, and not to the British government, it could not really be relied upon to create an estoppel.[4]

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[1] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147.

[2] Ibid., p. 69.

[3] See below, p. 192. It does not appear that the U.K. used the plea of estoppel in the *Corfu Channel* case (Preliminary Objection), *I.C.J. Reports*, 1948, p. 19, against the Albanian argument that it was not bound to accept the Court's jurisdiction despite the Albanian letter of 2 July 1947 from the Minister of Foreign Affairs to the Registrar, stating 'il est prêt, malgré cette irrégularité commise par le Gouvernement Britannique, à se présenter devant la Cour'. Perhaps the reasons for this were (1) that the statement was not made to the U.K., and (2) that the U.K. was not prejudiced by relying on the statement.

[4] Moore's *International Arbitrations*, vol. iii, p. 2548.

[5] Italy/Peru: *American Journal of International Law*, 6 (1912), p. 747. See also the *Corvaia* case, Ralston's *Venezuelan Arbitrations* (1903), p. 2782, where the claimant, having accepted public and confidential employment with one State as a naturalized citizen of that State, was estopped from setting up the citizenship which he formerly held. Also the *Texas Bonds* case, Moore's *International Arbitrations*, vol. iv, p. 3591.

Many of the cases on estoppel by conduct illustrate the simple principle that the law will demand consistency in conduct where the result of inconsistency would be to prejudice another party. In the *Shufeld Claim*[5] the United States argued that the conduct of Guatemala in treating a concession to Shufeld as a valid concession for a period of six years precluded Guatemala from denying the validity of the concession before the Tribunal. The argument of the United States was that:

> 'The principle that an international tribunal will not regard as a nullity a contract concluded by a government when that government, by its acts performed in pursuance of that contract, has clearly recognised the contract as valid, is similar to the doctrine of estoppel in municipal law. . . . The U.S. contends that where, as in this case, a government enters into a contract, repeatedly assures the other party, or his assignee, of the validity of that contract and accepts from the other party, or his assignee, benefits growing out of the contract, an international tribunal is constrained to hold that such a contract is valid and a binding one.'[6]

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[1] Witenberg, *Théorie des preuves devant les jurisdictions internationales*, p. 27.

[2] Lauterpacht, op. cit., p. 204; Ralston, *Law and Procedure of International Tribunals*, Supp. (1936), s. 402 (*b*).

[3] Moore's *International Arbitrations*, vol. v, pp. 4979–83.

[4] Hence Friede, op. cit., p. 523; and Holohan, 'Legal Aspects of the Inter-Allied Debt', *Boston University Law Review*, 14 (1934), pp. 47–81 at p. 78, criticize reliance on this case as one of estoppel. See Cheng, op. cit., p. 148 for other reasons.

Contrast the Decree of the Peruvian Government in May 1877 disclaiming responsibility for the acts of the pirate vessel Huascar: this was rightly construed by the Law Officers of the Crown to be addressed to maritime nations, including Great Britain, and the Law Officers took the view that Peru was consequently estopped from claiming the vessel was of Peruvian nationality: Draft of letter prepared for transmission to the Peruvian Minister in London, cited McNair, *International Law Opinions*, vol. i, p. 277.

[5] Dept. of State, Arbitration Series No. 3, Washington 1932, s. 65 et seq.: *U.N.R.I.A.A.*, vol. ii, p. 1081.

[6] Ibid., at s. 68. The Tribunal approved of the *Claim of Joseph E. Davies* (1926) U.S./Mex. Opinions of Commissioners under Convention concluded 8 September 1923 between U.S. and Mexico, Washington, 1927, s. 199 et seq.: in that case three payments under the contract to the claimant by Mexico precluded Mexico from denying the validity of the contract. See also the *Mariposa Claim*, American-Panamanian General Claims Arbitration, Dept. of State Arbitration Series No. 6, Washington, 1934, p. 547; *Spanish Zone of Morocco Claims* (1923), *U.N.R.I.A.A.*, vol. ii, p. 685 at p. 686; *North Atlantic Coast Fisheries* case (1910), Scott's *Hague Court Reports*, p. 141 at p. 186. See also the Report of the Law Officers of the Crown dated 7 February 1873 to the effect that Uruguay, having acted upon the Postal Convention of 1853 for many years, could not legally denounce it on the ground of non-compliance with constitutional requirements; this is very much akin to estoppel and could be so treated: cited McNair, op. cit., p. 38.

Referring to this contention, the Arbitrator said: 'I have no doubt that the contention of the United States is sound and in keeping with the principles of international law and I so find.'

Similarly, when a State has treated an individual as having a particular nationality it cannot, at a later stage, obtain an advantage over him by treating him as not being possessed of that nationality. In *Kunkel et al.* v. *Polish State*[1] the Tribunal took the view that Poland, having liquidated the estates of certain persons on the ground that they were of German nationality, was estopped from denying their German nationality so as to deprive those persons of the legal remedies afforded to German nationals under the Peace Treaties. In *Kahane* v. *Parisi and the Austrian State*[2] the conduct of the Roumanian Government and the Central Powers in treating the native Jews of Roumania as Roumanians throughout the war estopped them from denying to these Jews the status of Roumanian 'ressortissants' within the meaning of the treaty of St. Germain.

There are in English and American municipal law two rules which are sub-species of estoppel by conduct: they are, first, the rule of election of remedies, and, second, the rule of preclusion of inconsistent positions.[3] Both rules operate within the domain of judicial proceedings but they are neither of them cases of *res judicata* (nor are they treated as *res judicata* in municipal law) for they relate to the conduct of the parties before the Tribunal, not to the effect of the judgment of the Tribunal on issues decided in the judgment. By the rule of election of remedies a party pursuing one remedy rather than another, where that party is entitled to recover via either remedy but not both, is precluded from subsequently pursuing the remedy against which he elected in the first instance. The case of the *Yukon Lumber Company*[4] seems to indicate an acceptance of this particular form of estoppel by an international tribunal: in that case one Mountain had sold timber to the United States authorities and, certain dues on the timber being unpaid, the question arose whether the United States was liable to pay the dues to the British Government. The Tribunal stated:

> 'Even now, before this Tribunal, the British government claim for payment of dues, and they have added only as an alternative a claim for the value of the timber. The opinion of this Tribunal is that it is impossible to admit that after having at the beginning ratified the trespass and claimed during thirteen years for only payment of dues,

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[1] (1925) German-Polish Mixed Arbitration Tribunal: *Annual Digest, 1925–1926*, Case No. 318.

[2] (1929) Austro-Roumanian M.A.T.: *Annual Digest, 1929–1930*, Case No. 131: see also *Rychnewsky et al.* v. *Empire Allemand*, (Germ./Czech.) *Recueil des décisions des tribunaux arbitraux mixtes*, vol. iii, p. 1011 at pp. 1017–18; *Kramata* v. *Empire Allemand*, ibid., p. 988.

[3] For the operation of these rules in English municipal law see Halsbury, op. cit., p. 183, and in American law see *Harvard Law Review*, 65 (1951–2), pp. 822–5.

[4] (1910), Nielson, s. 438 et seq. cited in Friede, op. cit., pp. 533–4.

> and still now claiming for that payment, the British government is entitled to contend that they retained the ownership of the said timber and claim for its value as representing the thing itself which has been consumed. Moreover, the British government does not claim first for the value and secondly for the dues, but first for the dues, and in the alternative for the value. It seems that this alternative is somewhat contradictory, as it is clear that the claim for the dues is exclusive of a claim for recovery.'

By the rule precluding inconsistent positions a party will be estopped from taking up a position on the facts of an issue inconsistent with that he has previously taken up on the same issue. In the *S.S. Lisman*[1] the claimant before a British prize court in 1782 had proceeded on the ground that, whilst the Crown had a right to seize the goods and detain the ship, there was an undue delay on the part of the Crown in taking the steps they were otherwise entitled to take. However, in a subsequent claim before an international tribunal the claimant complained of the actual seizure of the goods and detention of the ship; the Tribunal stated:

> '. . . it is seen at once that by the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ships was lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, the claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on. . . .'[2]

(2) *The Essentials of Estoppel*

So far our concern has been with the various forms which estoppel may take. It is suggested that estoppel, in whatever form it arises, operates as a binding preclusion only when certain essential conditions are present. It is to a consideration of these essential conditions that we now turn.

(*a*) *The meaning of the statement must be clear and unambiguous*

Reference has already been made[3] to the *Eastern Greenland* case,[4] the *Sharp* case,[5] the *Canevero* case[6] and the *Salem* case[7] as illustrations of the principle that an estoppel can only rest upon a statement which in its meaning is clear and unambiguous: and it matters not whether the statement be conveyed in writing or by conduct. There is ample authority to support this proposition.

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[1] (1937) U.S./G.B., *U.N.R.I.A.A.*, vol. iii, p. 1769.

[2] Ibid., at p. 1790.

[3] Above, p. 185.

[4] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147. In the same case Norway sought to argue that the Danish notes to various powers between 1915 and 1921, in seeking recognition of the Danish position in Greenland, estopped her from claiming that she had sovereignty over Greenland at that time: the Court rejected this view on the ground that this was not a necessary construction of the Danish notes (see Judgment, pp. 55, 62).

[5] Moore's *International Arbitrations*, vol. iii, p. 2548.

[6] Italy/Peru: *American Journal of International Law*, 6 (1912), p. 747.

[7] *U.N.R.I.A.A.*, vol. ii, p. 1180.

In the *Serbian Loans* case[1] the question arose whether, by their conduct in accepting payment of interest upon the loans in French francs as opposed to 'gold francs', the French bondholders had represented that they were prepared to accept payment in French francs. If they had, then despite the derogation from the terms of the loans it was arguable that they were henceforth estopped from claiming payment according to the strict terms of the loans. On this point the Permanent Court said:

> '. . . when the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation of the bondholders upon which the debtor state was entitled to rely and has relied.'[2]

Similarly, in the *Russian Indemnity* case[3] before the Hague Tribunal in 1912, the award of the Tribunal stressed the lack of ambiguity in the conduct of the parties relating to the status of the Russian victims of war operations as indemnities.

Clearly the question whether there is any ambiguity, apparent or latent, and if so how it should be resolved, is a question to which the established rules of interpretation apply. This much is apparent from the estoppel cases, that a tribunal will not take a phrase out of its context and upon that isolated phrase create an estoppel: on the contrary, the tribunal will review the whole circumstances and the background of diplomatic negotiation and correspondence even for a period of thiry years prior to the hearing of the case as it did in the *Russian Indemnity* case.[4] In the *Eastern Greenland* case,[5] though, as we have previously suggested, the Permanent Court chose to regard the Ihlen declaration as creating a binding obligation rather than an estoppel, the application of a similar principle is called for in order to discover the real meaning of the declaration.[6] Indeed, unless and until the meaning of the representation is clear, there is no justification for binding one or other of the parties to that meaning.

One final point seems relevant here. The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of the rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal, and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation of them. The International Court has rightly said that 'interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument'.[1] The relation of estoppel to the sphere of fact and law is that it operates in the former only, but in so doing it may determine the context within which the legal rights and duties of the parties have meaning and application: a nice distinction, but a necessary one.

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[1] *P.C.I.J.* (1929), Series A, Nos. 20/21, pp. 5–89.

[2] Ibid., p. 39. France also pleaded estoppel against Serbia on the basis of Serbia's own legislation: see reply of Basdevant (Series C, No. 16, III, p. 255). '. . . La Serbie ne peut pas prétendre, et elle n'a d'ailleurs pas prétendu, que les clauses ainsi établi par sa législation ne seraient pas valables. . . . Si elle tentait de le faire ou de le prétendre, elle s'exposerait à se voir opposer cette doctrine de l'estoppel à laquelle il a été fait allusion . . . on a dit d'elle qu'elle interdit à quelqu'un de souffler à la fois le chaud et le froid.'

[3] Scott's *Hague Court Reports*, p. 297 at p. 317. See below, p. 192.

[4] Ibid.

[5] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147. See also the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, at p. 138; *United States Nationals in Morocco* case, *I.C.J. Reports*, 1952, at p. 200.

[6] See above, p. 185.

(*b*) *The statement or representation must be voluntary, unconditional and authorized*

In general, and leaving aside the question of treaties imposed upon the vanquished after a war, a representation which creates an estoppel must be made voluntarily by the party against which the estoppel is pleaded. It follows that duress or fraud of any material kind will nullify the plea of estoppel. In the *Salvador Commercial Company* case,[2] Salvador contended that the Company had not fulfilled the terms of its concession, despite the reports of its agents that it had in fact done so; the Arbitrators said:

> 'It is of course obvious that the Salvador Government should be estopped from going behind those reports of its own officers on the subject and from attacking their correctness without supplementary evidence tending to show that such reports were induced by mistake or were procured by fraud or undue influence. No evidence of this kind is introduced here.'[3]

The obvious implication is that upon proof of fraud or duress the estoppel would have been nullified. Similarly, in the *Cuculla* case,[4] when faced with the argument that the constitutional government of Mexico had accepted responsibility for the acts of the rebel Zuloaga Government by the treaty of Puebla with Great Britain, the Tribunal said:

> 'But these concessions, extorted by a duress as actual and relentless as ever pressed upon an embarrassed and exhausted government, were made to buy its peace and, rejected by its powerful adversaries, can not now furnish any assistance to this commission in determining the interesting question presented in this case.'[5]

A situation parallel to that created by fraud or duress, but obviously not identical, is that in which the conduct of one party lacks a 'voluntary' character by reason of that party's inability to act otherwise; this would likewise vitiate the plea of estoppel. In the *Serbian Loans* case,[1] one of the grounds upon which the Court refused to regard the bondholders as estopped from claiming payment under the original terms of the debt was the simple inability of the bondholders to do anything but accept the Serbian payment of French francs, pending their efforts to organize concerted measures for the defence of their rights and to interest the French Government in their case. The Permanent Courts said 'it does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them'.[2] It is possible also that excusable error in making the statement can preclude the setting up of the plea of estoppel upon the statement:[3] but the error would have to be 'excusable', that is to say, not due to the fault or neglect of the party making the statement, for otherwise that party could mislead another and yet rely upon its own fault to escape the liability which an estoppel might impose.

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[1] *A.O. on the Status of S.W. Africa* (*I.C.J. Reports*, 1950, p. 129 at p. 135): the dictum refers to the declarations by South Africa to the League and the United Nations acknowledging that its duties under the Mandate continued.

[2] *United States Foreign Relations* (1902), p. 862.

[3] Ibid., p. 867.

[4] Moore's *International Arbitrations*, vol. iii, p. 2873.

[5] Ibid., p. 2879. *Sed quaere* if the United States, as claimant in this case, could have pleaded estoppel on the basis of a representation made to Great Britain and not to the United States; there was no privity between the two.

Where a representation is made conditionally, either in the sense that it is made in the course of negotiations with a view to a settlement which does not materialize, or in the sense that it is made subject to conditions later unfulfilled by the other party, it cannot create a binding estoppel. In the *Advisory Opinion on the European Commission of the Danube*[4] the Permanent Court referred to the Declaration of the three powers, the *modus-vivendi* of October 1922, in these terms:

> 'It will suffice to observe that, though it is perfectly true that the three delegates of France, Great Britain and Italy, with a view to arriving at an amicable solution of the difficulties with which the Commission was faced, declared that they would agree to leave to the Roumanian authorities the enforcement of the regulations . . . it is equally true that this proposal was made dependent upon conditions which were not accepted by the Roumanian government. No agreement was therefore reached and the matter was left as it stood. The most that can be inferred from what then happened is that the three delegates did not consider it impossible for the European Commission to perform its duties even without the power of making and enforcing regulations above Galatz.'[5]

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[1] *P.C.I.J.* (1929), Series A, Nos. 20/21, pp. 5–89.

[2] Ibid., p. 39.

[3] See Cheng, op. cit., p. 148, citing the *Mavrommatis Concessions* case, *P.C.I.J.*, Series A, No. 5, p. 31, and the *Closure of Buenos-Aires* case (1870), Moore's *International Arbitrations*, vol. ii, p. 637: these appear to be cases of admission rather than binding estoppel, but the principle is probably applicable to estoppel. See also the *Kling Claim* (1930) U.S./Mex. General Claims Commission, *Opinions of Commissioners* (1931), p. 36, where a Consul's report did not bind the United States since it was prepared without detailed examination of the circumstances. In the *Eastern Greenland* case, Judge Anzilotti seems to have accepted, in his dissenting judgment, the principle that an excusable error would preclude the creation of a binding undertaking: but, on the facts, he held the Ihlen declaration was not an excusable error (Series A/B, No. 53, p. 92).

[4] *P.C.I.J.* (1927), Series B, No. 14, p. 6.

[5] Ibid., p. 35. See also the *Eastern Greenland* case (Judgment, p. 73) where the Court stressed that the Ihlen undertaking was 'unconditional and definitive'.

The Permanent Court appears to have treated this *modus vivendi* as admissible evidence, with a limited influence, but not as a binding estoppel.

It is, finally, clear that before a party can be bound by a representation the representation must have been made with its authority, express or implied: in the absence of such authority another party would not be entitled to rely upon the statement. Where the authority is expressly given no real difficulty arises, but in cases of implied authority it will be a question of construction of the status of the person actually making the representation and the sphere within which he purports to act with authority: there is a notion of 'apparent' authority which it would seem international tribunals will accept. In the *Eastern Greenland* case[1] the Court had no doubt that the Norwegian Minister of Foreign Affairs, acting within the sphere of foreign affairs, could be treated by the Danish Government as having authority to give a reply binding on his Government.

> 'The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.'[2]

As we have seen, in the *Salvador Commercial Company* case[3] the Government was estopped by the reports of its agents whose function was to report upon the degree of compliance by the Company with the concession; and in the *Russian Indemnity* case,[4] the Hague Tribunal held the Russian Government bound by the conduct of its embassy which had negotiated on its behalf. One rather curious case in this context is the *Chase Claim*[5] where the United States Minister in Panama, acting privately and without government instructions, had negotiated a settlement between an American national and the Panamanian Government. The arbitrators held that the participation of this Minister gave to the settlement the character of a diplomatic settlement and precluded the United States from bringing a claim contesting its validity. This reasoning is difficult to follow, for there is nothing to suggest that the Panamanian Government understood the

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[1] *P.C.I.J.* (1933), Series A/B, No. 53, pp. 22–147.

[2] At p. 71.

[3] United States *Foreign Relations*, 1902, p. 862 at p. 867. This whole problem is in essentials the same as the problem of authority to conclude a binding treaty or other obligation. See Memorandum of the Solicitor for the Dept. of State (Clark), 14 January 1911 (cited Hackworth, *Digest*, vol. v, p. 393): '. . . there is little doubt but that a nation entering into an arrangement by the exchange of diplomatic notes is, certainly as to the other negotiating power, estopped to say that the Foreign Office, in making such arrangement, had no power or authority in the premises.'

[4] Scott, *Hague Court Reports*, p. 297 at p. 321. See the *Culculla* Case, Moore's *International Arbitrations*, vol. iii, p. 2873 where the Tribunal rejected the plea that the Zuloaga Government was authorized to contract on behalf of Mexico.

[5] American-Panamanian General Claims Arbitration, Dept. of State Arbitration Series, No. 6, Washington, 1934, p. 374: *Annual Digest, 1933–1934*, Case No. 90. The case is dealt with by Friede, op. cit., p. 541 as one of estoppel. See *Federal Coop Insurance Corp.* v. *Merrili*, 68 Sup. Ct. 1 (noted in *Georgetown Law Review*, vol. 16, pp. 273–6) for the principle that a sovereign is liable only for the authorized acts of his agent.

Minister to be acting on his Government's behalf. The more reasonable view, taken by the United States Commissioner on the Tribunal, is that the participation of the Minister sufficed to negative the claimant's plea that the settlement was imposed upon him by the Panamanian Government under duress.

(*c*) *Reliance in good faith upon the representation of one party by the other party to his detriment* (*or to the advantage of the party making the representation*).

This third essential illustrates how the principle of good faith lies at the very root of the doctrine of estoppel, for that doctrine has binding effect only where the party making the representation has secured some advantage thereby, or the other party relying on the representation has as a result suffered some detriment: the consequent change in the position of the parties means that in order to maintain good faith the party must stand by his representation. The advantage to the one party or detriment to the other is the 'consideration', to use an English term of contract law, which binds the parties. In the case of estoppel by conduct it must be clearly shown to exist; in the case of estoppel by treaty or other undertaking in writing it lies in the reciprocal exchange of promises or, where the undertaking is unilateral, in the reliance of a party on that undertaking. In the *Serbian Loans* case[1] the Permanent Court stated:

> '. . . when the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying this principle in this case. . . . There has been no change in position on the part of the debtor state. The Serbian debt remains as it was originally incurred; the only action taken by the debtor state has been to pay less than the amount owing under the terms of the loan contracts.'[2]

Similarly, when in the *Tinoco* arbitration[3] Costa Rica argued that the non-recognition by Great Britain of the Tinoco Government during its period of control estopped the British Government from claiming that the Tinoco Government could confer rights binding upon succeeding governments, the arbitrator, Taft C.J., stated:

> 'I do not understand the arguments on which an equitable estoppel in such a case can rest. The failure to recognise the de facto government did not lead the succeeding government to change its position in any way upon the faith of it. . . . An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.'[4]

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[1] *P.C.I.J.* (1929), Series A, Nos. 20/21, pp. 5–89.

[2] At p. 39.

[3] *American Journal of International Law*, 18 (1924), p. 147.

[4] Ibid., at p. 156. This award was approved in the *George W. Hopkins* case (1926), U.S./Mex.: *Annual Digest, 1925–1926*, Case No. 317. Taft C.J. refused to follow *Schultz's* case (Moore's *International Arbitrations*, vol. iii, p. 2973), *Janson's* case (ibid., p. 2902), and *Jarvis's* case

In the *Shufeld Claim*[1] the United States stressed the fact that for six years the Guatemalan Government had received benefits under the contract and Shufeld had expended money on the concession. In the *Russian Indemnity* case[2] the Hague Tribunal noted that Turkey had obtained value for its agreement on indemnity by the cessation of hostilities; and in the *Santa Isabel Claims*[3] the American Commissioner spoke of one 'who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse. . .'. It is on the same basis that Friede criticizes the use of the *Chorzów Factory* case[4] as an authority on estoppel, for there was no reliance on the conduct of the Polish Government to the detriment of the claimants.[5] In the absence of a change of position of the parties of the kind we have considered, the effect of representations or admissions is that they operate, not as binding estoppels, but as evidence which can be used to weaken a party's case on the ground of inconsistency.[6]

Before turning to this distinction between binding estoppels and evidence of a merely probative value, it is necessary to note that the effect of an estoppel may bear upon persons who are not parties in the strict sense; in municipal law this wider effect is described in the statement that an estoppel binds 'parties and their privies'. Privity, in this sense, will exist between persons whose interest is so identified that their claims are based upon the same legal right, or between persons who enjoy a mutual or successive relationship to the same rights of property. Often the representations of a State will estop nationals of that State,[7] and a State claiming upon a national's behalf will be estopped by the national's own representations in so far as the State claims in a purely representative capacity. It will be less frequently found that States are thus identified in interest,[8] although cases could arise on succession to territory where privity would exist.

(Ralston's *Ven. Arb.* (1903), p. 150). See the view of the State Department on the evidential weight of non-recognition on 8 August 1925; cited in Hackworth, *Digest*, vol. v, pp. 496–7.

[1] *U.N.R.I.A.A.*, vol. ii, p. 1081 at p. 1094.

[2] Scott, *Hague Court Reports*, p. 317.

[3] *American Journal of International Law*, 26 (1932), p. 196. See also *Cushing* v. *Laird*, 107 U.S. 69: *Prize Cases decided in the U.S. Supreme Court, 1789–1918*, vol. iii, p. 1853.

[4] *P.C.I.J.* (1927), Series A, No. 9, at p. 31.

[5] Friede, op. cit., p. 525: the judgment is better authority for the proposition that one party who has precluded another from fulfilling certain obligations cannot thereafter call upon that other to fulfil those same obligations.

[6] See below, p. 195.

[7] In *The Amy Warwick et cet* (1862) 2 Black. 635: *Prize Cases decided in the United States Supreme Court*, vol. iii, p. 1438, official recognition of belligerency by Great Britain estopped British citizens from denying that a war existed, together with its consequences upon neutrals.

[8] See McNair, 'The Legality of the Occupation of the Ruhr', in this *Year Book*, 5 (1924), p. 17 at p 36, who describes the principle of privity in estoppel as a particular application of the general principle *res inter alios acta*: he doubted that the interpretation of the Versailles treaty by Great Britain could affect the rights of Germany, since there was no privity between the two. See also the *Cuculla* case, Moore's *International Arbitrations*, vol. iii, p. 2873.

(3) *Representations not creating a Binding Estoppel but having Probative Value*

Where one or other of the foregoing essentials of a binding estoppel is absent the representation, whether by words or conduct, does not lose all value for, although lacking conclusive effect, it may still be adduced in evidence as an admission to show a lack of consistency or weakness in a party's position. Cheng, contrasting simple admissions with the true equitable estoppel, says:

> 'Unlike the latter, an admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an *argumentum ad hominem*, which is directed at a person's sense of consistency, or what in logic is paradoxically called the "principle of contradiction".'[1]

In the *Tinoco* arbitration,[2] Taft C.J. rejected the suggestion that non-recognition would create an estoppel but admitted that it had a certain probative value in saying 'the evidential weight of non-recognition against the claim of its *de facto* character I have already considered and admitted. . .'.[3] The *Croft* case is,[4] as we have already suggested, a case of admission, not estoppel; similarly with cases like the *Mechanic*[5] and the *Meuse* case.[6]

McNair,[7] after reviewing Great Britain's attitude since 1920 towards Germany, rightly suggested that in so far as Great Britain might choose to contest the legality of the French occupation of the Ruhr, an 'international tribunal could hardly fail to be unfavourably impressed by those inconsistencies in the event of a direct juridical issue being raised between Great Britain and France'.[8] But this principle of weighing evidence with a view to detecting inconsistency is not the same as the principle of binding estoppel: as McNair put it, 'this is not estoppel *eo nomine*, but it shows that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*'.[1]

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[1] Op. cit., p. 147.

[2] *American Journal of International Law*, 18 (1924), p. 147.

[3] Ibid., p. 149.

[4] Moore's *International Arbitrations*, vol. v, pp. 4979–83.

[5] Ibid., vol. iii, p. 3221: in that case Ecuador, having abided by the principle 'free ships, free goods' established by Treaty of 1795 when advantages were to be gained thereby, was held to be bound by the principle when it imposed an obligation.

[6] *P.C.I.J.* (1937), Series A/B, No. 70, at p. 25 where the Court refused to admit the Netherlands complaint of an act of which they had themselves set an example in the past. See also the argument of Great Britain in the *Fur Seal* arbitration (Moore, op. cit., vol. i, pp. 775 et seq.) when the inconsistency between the United States position vis-à-vis the Russian ukase of 1821 and her position vis-à-vis Great Britain was demonstrated.

[7] 'The Legality of the Occupation of the Ruhr', this *Year Book*, 5 (1924), pp. 34–37. The same author in *Law of Treaties* (1938), p. 407, cites a similar example in the dispatch from the Secretary of State for Foreign Affairs to the British Ambassador at Tokio, 14 July 1916, which took the view that France, by her attitude on the effect of annexation on existing commercial rights in Madagascar after the French annexation, was debarred from appealing to Great Britain to join in protest to Japan over the Japanese annexation of Korea.

[8] This *Year Book*, 5 (1924), p. 36.

There is no special difference in the form which an admission, as opposed to an estoppel, may take. To a certain extent admissions have a wider scope than estoppels, for an admission may concern a question of the interpretation of a legal rule or the existence or non-existence of legal rights; estoppels, in contrast, are confined to representations of fact. There may, however, be circumstances in which the admission covers a statement of fact, and in these circumstances the question will arise whether this admission should be treated as a binding estoppel or merely as a statement having probative value. This question cannot, in our submission, be answered by looking at the form which the statement takes: the answer lies in ascertaining whether the statement fulfils the essential conditions of an estoppel. If it does not, then, although denied binding effect, it can still be adduced as evidence to weaken the case which the party making the statement or admission now puts forward.

Sir Gerald Fitzmaurice, in a recent article in this *Year Book*,[2] has drawn upon some recent decisions of the International Court to illustrate the Court's attitude towards admissions. This attitude shows an application to admissions of principles similar to those applied to estoppels: for example, an admission will not lightly be presumed against a State and will be considered only within its general context, not as an isolated statement;[3] superficial contradictions and inconsistencies will not be given much importance.[4] Similarly, mere proposals or concessions made in the course of negotiations will not rank as admissions.[5] All these principles are, as we have shown, applicable also to estoppels, but in all the cases where a statement is treated as an admission rather than as a binding estoppel one or more of the conditions essential to an estoppel are absent. For example, in the *Minquiers and Ecrehos* case[6] the Court dealt with a letter in which the French Government had, apparently, admitted that the Minquiers were in 1819 an English possession.

> 'By his Note of June 12th, 1820, to the Foreign Office, already referred to . . ., the French Ambassador in London transmitted a letter from the French Minister of Marine of Sept. 14th, 1819 to the French Foreign Minister, in which the Minquiers were stated to be 'possédés par l'Angleterre', and in one of the charts enclosed the

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[1] Ibid., p. 35. He is here referring to the *Tinoco* arbitration and applying the principle of that case to the British attitude.

[2] 'The Law and Procedure of the International Court of Justice', this *Year Book*, 30 (1953), pp. 44–47.

[3] *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, p. 138; *United States Nationals in Morocco*, ibid., 1952, p. 200.

[4] *Fisheries* case, loc. cit., p. 138; *Ambatielos* case (First Phase), *I.C.J. Reports*, 1952, Opinion of Judge Basdevant at pp. 69–70.

[5] *Minquiers and Ecrehos* case, *I.C.J. Reports*, 1953, p. 71 (by necessary implication).

[6] Ibid., p. 4.

Minquiers group was indicated as being British. It is argued by the French Government that this admission cannot be invoked against it, as it was made in the course of negotiations which did not result in agreement. But it was not a proposal or concession made during negotiations, but a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof. This statement must therefore be considered as evidence of the French official view at that time.'[1]

The Court, therefore, treated this admission as 'evidence' merely, not as conclusive of the fact that in 1819 England possessed sovereignty over the Minquiers. Indeed, the Court could not have regarded this as an estoppel, for one of the essential conditions of estoppel was missing, namely the proof of some advantage gained thereby to France or some detriment to England. In the absence of that condition the statement could only qualify as an admission.

The actual value of any particular admission will, of course, be for the Tribunal to decide in view of all the facts of the case. Factors such as duress, fraud, or mistake will doubtless vitiate an admission just as they do an estoppel; and an admission made directly to a party will have more effect than an admission to be gleaned from, say, correspondence between different departments of the administration of a State.

The difference in effect between an estoppel and an admission is then, first and foremost, that the former is binding whereas the latter has mere probative value. An estoppel will exclude altogether evidence of a disputed fact, whereas an admission will either render evidence superfluous where there is no other evidence to contradict the admission or, where there is such contradictory evidence, will weaken or perhaps nullify the contradictory evidence—depending on the relative weight of the admission and such evidence. There is yet another difference. An estoppel only binds between parties and privies; it does not assist the stranger. An admission may well do, although, as we have suggested, an admission to a third party will not have the same force as an admission direct to the party who seeks to adduce it in evidence.

(4) *Estoppel in Relation to Acquiescence*

Most legal systems are more ready to impose negative duties than positive ones, and a duty to protest or to take other effective action to safeguard established rights is not to be regarded, *prima facie*, as a condition of the continuing validity of those rights. On the other hand, there are situations in which one party's failure to act or acquiescence will prejudice his rights against another who has been misled by that party's inaction or silence. For example, in English law a duty to speak out may be postulated where one party, possessing an interest in property, knows that another party, unaware of that interest, purports to be obtaining an incompatible interest in the same property.[1] When this duty is broken, the silence of a party operates like an estoppel, so that he is precluded by his apparent acquiescence from setting up his own interest in the property to defeat the interest acquired by the innocent purchaser.

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[1] Ibid., p. 71. Judge Basdevant, in a Separate Opinion (at pp. 80–81), took a different view on this point and used arguments which are applicable both to estoppels and admissions. He denied that the letter could have any implication on the question of sovereignty, since it was concerned only with oyster-fisheries; moreover, he denied that the Minister of Marine could be assumed competent to make a binding statement on matters of state territory. These arguments relate to (1) the meaning of the statement, and (2) the authority of the person making it; both are relevant to estoppel (see above, pp. 188, 192).

In international law this relation between acquiescence and estoppel is also apparent, and a duty to speak out or act may in certain circumstances be likewise postulated. In the *Costa Rican–Nicaragua Boundary* case[2] Nicaragua argued that a treaty of 1858 defining the boundary was not binding, since a third state, San Salvador, had not ratified in its capacity as guarantor. The Arbitrator, in rejecting this contention, said:

> 'These views are strengthened by a consideration of the evidence adduced on the part of Costa Rica to prove acquiescence by Nicaragua for ten or twelve years in the validity of the treaty. I do not regard such acquiescence as a substitute for ratification by a second legislature, if such had been needed, but it is strong evidence of that contemporaneous exposition which has even been thought valuable as a guide in determining doubtful questions of interpretation.'[3]

He also continued:

> 'But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. . . . Neither may now be heard to allege, as reasons for rescinding this completed treaty, any facts which existed and were known at the time of its consummation.'[4]

Another example of inaction or acquiescence operating as an estoppel is to be found in the Report of the Law Officers of the Crown of 14 January 1878, on the Turkish Guaranteed Loan (1855) in which they regarded the British Government's inaction as a waiver of rights and an estoppel from claiming such rights as might have been claimed but for the implied waiver.

> 'In our opinion the English Government has waived its right to the increased Egyptian tribute, and the action, or rather abstinence of action, by the British Government in 1871 is an instance of that consent on the part of at least one of the Guaranteeing Powers, which estops that Power from claiming, under the Convention, the additional tribute money as part of the security.'[5]

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[1] Halsbury's *Laws of England*, vol. xv, p. 241, and the list of authorities there cited.

[2] Moore's *International Arbitrations*, vol. ii, p. 1945: this is actually the report to the arbitrator (the President of the U.S.A.).

[3] Ibid., p. 1959: the arbitrator is here referring to the Nicaraguan argument that the treaty was not sanctioned by its own constitution.

[4] Ibid., p. 1961.

[5] Cited McNair, *Law of Treaties* (1938), p. 261.

In the *Venezuelan Preferential Claims* case[1] the Hague Tribunal stressed the lack of protest of Venezuela and the neutral Powers against the claims of the blockading Powers to preferential treatment, and in the *Landreau Claim*[2] it was said:

> 'Of course if there was anything to show that Célestin knew of this release at the time of its execution and abstained from putting forward his claim, he and his representatives would be estopped from making any claim against the Peruvian government, but there is nothing to show that there was any such acquiescence in the transaction by Célestin.'

More recently, in the *Anglo-Norwegian Fisheries* case,[3] without using the term estoppel, the International Court placed great stress upon the effect of absence of protest against the Norwegian claims:

> 'In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other states, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognised although it constitutes a derogation from the rules in force.'[4]
>
> 'The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.'[5]

In effect, though not in express terms, this is almost like raising the acquiescence of Great Britain as an estoppel against her; and, indeed, certain writers have stressed the similarity of effect between estoppel and acquiescence when acquiescence is treated as one element in the acquisition of title by prescription.[6]

[1] Scott's *Hague Court Reports*, p. 56. Another example of the value of protest is found in the protest of the ex-Allied Powers against the Treaty of Rapallo of 16 April 1922, whereby they 'expressly reserve for their Governments the right to declare null and void any clauses in the Russo-German Treaty which may be recognised as contrary to existing Treaties'. McNair (op. cit., p. 124) rightly says that the significance of the protest is that they could not thereafter be estopped from holding Germany to a strict performance of her prior obligations to them.

[2] *U.N.R.I.A.A.*, vol. i, pp. 365–6: the claim concerned the release of certain contractual rights to which Célestin Landreau was not a party, and where the Peruvian Government knew of his 30 per cent. share in the contractual rights.

[3] *I.C.J. Reports*, 1951.

[4] Ibid., p. 130.

[5] Ibid., p. 139.

[6] Lauterpacht, 'Sovereignty over Submarine Areas', this *Year Book* 27 (1950), at p. 395; MacGibbon, 'The Scope of Acquiescence in International Law', ibid., 31 (1954), at p. 147. See the *Chamizal* arbitration (U.S./Mex.) of 24 June 1910, *American Journal of International Law*, 5 (1911), pp. 785 et seq., where the U.S. argued that her long, undisturbed possession estopped Mexico from asserting title. The tribunal held Mexico's failure to protest was not acquiescence and therefore estoppel could not arise. Also the *Title to Islands in the Bay of Fundy and Passamaquoddy Bay*: Moore's *International Adjudications* (Modern Series), vol. vi, p. 195, for British argument that profound silence over twenty-three years was tantamount to an estoppel. In the *Palmas Island* case, *American Journal of International Law*, 22 (1928), p. 867, the award treated the question of sovereignty over territory as one of fact as to which party exercised sovereignty; the absence of protest by the Netherlands to the Treaty of Paris of 1898 under which the U.S.A. purported to acquire sovereignty by succession from Spain was disregarded.

It is believed, however, that this similarity in effect tends to confuse the notion of acquiescence with the doctrine of estoppel in circumstances in which estoppel cannot really be invoked. In general the claim to acquire rights by prescription must rest upon the acquiescence of States generally, or at least those States adversely affected by the claim. Especially in circumstances similar to those in the *Anglo-Norwegian Fisheries* case, where the rights in the high seas belong to the community at large, the acquiescence must be shown to exist in the community at large. Hence, Judges Read[1] and Hsu Mo[2] stressed the need for recognition or acquiescence by the international community as a whole. In contrast, the plea of estoppel is made *inter partes* (or their privies); it affects the position between the parties without regard to the question whether the claim is recognized or acquiesced in by the community generally. There may, of course, be circumstances in which only one State is affected by another State's claims, as, for example, where the claim relates to the exact situation of a boundary between the two. In these circumstances the relation between acquiescence (and a prescriptive title) and estoppel will be closer, but even here a number of conditions would have to be satisfied before acquiescence becomes tantamount to an estoppel. Before estoppel can be invoked on the basis of one party's acquiescence or inaction the following conditions would, in our submission, be essential:

(i) The purported acquisition of some right or interest by State A in ignorance of State B's conflicting right or interest.
(ii) Actual or constructive knowledge by State B that State A purports to be acquiring some right or interest in conflict with its own right or interest.[3]
(iii) Silence or inaction by State B such as to lead State A to suppose it possessed no conflicting right or interest.[4]
(iv) Some detriment to State A as a result of reliance upon the silence or inaction of State B, or some gain to State B as a result of State A's action.

When, therefore, as in the *Anglo-Norwegian Fisheries* case, the state proceeds with full knowledge of another state's conflicting right or interest, the inaction or silence of the latter may afford a basis for the acquisition of a title by prescription, but it cannot be treated as estoppel. There has been no deception and nothing which good faith, operating through the doctrine of estoppel, requires to be put right. Moreover, in most cases the State which purports to acquire the right is losing nothing: on the contrary the detriment is all on the other side, so that the doctrine of estoppel cannot operate to protect the State which has been placed in an improved position as a result of the silence or inaction of another. There may, of course, be exceptions: a State may, in genuine ignorance of the fact that a portion of territory lies within the boundaries of another, indulge in considerable expenditure on that territory to its improvement. In such circumstances that other State would be estopped by its inaction from asserting its ownership of the portion of territory affected, and there the difference between estoppel and acquiescence as an element in the acquisition of a title by prescription would be negligible.[1] In the main, however, the circumstances in which estoppel is relevant are distinct from those in which acquiescence should be considered as one element in the acquisition of a title by prescription.[2] The confusion of these two notions will only serve to lessen the burden of proving the acquisition of title by prescription and, since no requirement of good faith demands such result, it would seem that the use of the doctrine of estoppel in circumstances where prescription ought to be relied on and proved is inadmissible in international law.

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[1] *I.C.J. Reports*, 1951, p. 194.

[2] Ibid., p. 154.

[3] See the Dissenting Opinion of McNair in the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, p. 171: 'Supposing that so peculiar a system could, in any part of the world and at any period of time, be recognised as a lawful system of the delimitation of territorial waters, the question would arise whether the United Kingdom had precluded herself from objecting to it by acquiescence in it. An answer to that question involves two questions: When did the dispute arise? When, if at all, did the United Kingdom become aware of this system, or when ought it to have become aware but for its own neglect: in English legal terminology, when did it receive actual or constructive notice of the system?' And see Fitzmaurice, loc. cit., pp. 42–44; Waldock, 'The *Anglo-Norwegian Fisheries* case', this *Year Book*, 28 (1951), p. 165.

[4] The remarks of Johnson, 'Acquisitive Prescription in International Law', this *Year Book*, 27 (1950), p. 332 at p. 346, to the effect that a simple protest is no more than a temporary bar to the acquisition of a title by prescription now that procedures for settlement via the I.C.J. and other arbitral tribunals are available would not seem to apply equally to estoppel. The protesting State must take such measures as are designed to bring firmly to the notice of the other state that its rights or interests are infringed: once the ignorance is dispelled there can be no estoppel. See also the separate opinion of Judge Carneiro in the *Fisheries* case, *I.C.J. Reports*, 1951, at pp. 107–8.

CONCLUSIONS

1. The rule of estoppel operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit: as such the rule has been accepted by international tribunals.

2. The rule of estoppel is distinguishable both from the principle of *res judicata* and the principle that, in cases of ambiguity in the meaning of an agreement, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning.

3. The forms in which estoppel can arise are:
   - (*a*) By Treaty, Compromis, Exchange of Notes, or other Undertaking in Writing.
   - (*b*) By Conduct.

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[1] There would still be a difference: prescription presupposes a long period of time, estoppel does not. See the argument of the United Kingdom in the *Anglo-Norwegian Fisheries* case, *I.C.J. Pleadings*, vol. iv, p. 346.

[2] On prescription generally see Johnson, loc. cit., p. 332 et seq., and the authorities there cited.

4. The essentials of estoppel are:

   (*a*) The statement of fact must be clear and unambiguous.
   (*b*) The statement of fact must be made voluntarily, unconditionally, and must be authorized.
   (*c*) There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.

5. Representations or admissions lacking the essentials of an estoppel have a certain probative value, depending upon the circumstances, but do not bind a party conclusively: moreover, as distinct from true estoppel, their effect is not confined to parties and their privies.

6. Acquiescence may, when properly construed as a representation of fact and otherwise fulfilling the essentials of an estoppel, operate as an estoppel. This is not the same as the principle whereby, under the doctrine of acquisitive prescription, rights are acquired on the basis of another party's acquiescence; a confusion between the two leads to a lessening of the burden of proving the extent and duration of acquiescence necessary to establish a prescriptive right.

THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 1951–4: TREATY INTERPRETATION AND OTHER TREATY POINTS

By SIR GERALD FITZMAURICE, K.C.M.G., Q.C.

Legal Adviser to the Foreign Office

IN the article corresponding to the present one,[1] that appeared in volume 28 of this *Year Book* (hereinafter called the 1951 article), dealing with the findings and pronouncements on treaty law of the International Court of Justice, and of individual judges, in the decisions and opinions given during the period up to March 31st, 1951, the arrangement adopted was to treat the subject in two main divisions: A, dealing with treaty interpretation; and B, dealing with substantive points of treaty law. Division A (interpretation) was itself subdivided into (A) major principles of interpretation; and (B) subsidiary interpretative findings. It is proposed to follow the same system for the 1951–4 period now under discussion.

DIVISION A: TREATY INTERPRETATION

On the subject of interpretation, the major principles that seemed to underlie the work of the Court in the period up to 1951, as these were described in the 1951 article, were those of I, Actuality (or textual interpretation); II, the principle of the Natural or Ordinary Meaning; and, subject to these two, the principles of III, Integration (or interpretation of the treaty as a whole); and IV, Effectiveness (*ut res magis valeat quam pereat*). To these were added V, the principle of Subsequent Practice, according to which the effect actually given to a treaty by the parties, and their conduct in relation to it, is valid evidence as to its true meaning. In the period 1951–4, all these principles are reaffirmed or acted upon by the Court, or by individual judges, in such a way as to confirm their status as major principles of interpretation. In the light of certain other pronouncements, however, it is proposed to add to the five principles above mentioned a further one, namely VI, the principle of Contemporaneity, or the interpretation of texts and terms in the light of the meaning they possessed, or the sense in which they were normally used at the time when the treaty was concluded. The importance and significance of this would seem to be such as to justify its treatment as a major principle of interpretation. Unlike private contracts, the average duration of which is relatively short, treaties may endure for considerable periods and even for centuries. Due regard for the historical element in the interpretation of them is therefore clearly indicated.

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[1] The present article is the fourth in the series comprising the second cycle (March 31st, 1951–March 31st, 1954) of studies on the work of the International Court of Justice, considered from the standpoint of its interest for, and influence on, general legal theory and principle. The first three articles in this cycle on 'General Principles and Sources of Law'; 'Points of Substantive Law, Part I'; and 'Points of Substantive Law, Part II'; appeared in this *Year Book*, 30–32 (1953-1955/6). A fifth article, completing the period March 31st, 1951–March 31st, 1954, is planned for 1958, after which the author hopes to publish both cycles in book form.

§ 1. MAJOR PRINCIPLES OF INTERPRETATION

(1) THEORIES AND SCHOOLS OF THOUGHT

The work of the Court—or indeed the pronouncements of any tribunal—on treaty interpretation, can only be properly evaluated against the background of the various theories of interpretation that are or recently have been current, and the subject of acute debate and controversy.[1] For a full account of these, and of the nature of the controversies involved, reference is made to pp. 1–8 and 13–17 of the 1951 article. At the present moment, it can perhaps be said that while differences of opinion still exist, they are less acute than formerly, and that part of the reason for this lies in the firm lead given by the Court on a number of the principal issues concerned.

(*a*) *The textual versus the 'intentions' approach.* The textual method is the one on the whole favoured by the Court, though simply as an approach and not, so to speak, as a dead end. The textual approach represents, in part, a reaction against the notion that the primary object of interpretation is to give effect to the 'intentions of the parties', although the differences involved may perhaps now be said to be less about objectives than about emphasis and methodology. With the exception of those who support the extreme teleological school of thought,[2] no one seriously denies that the *aim* of treaty interpretation is to give effect to the intentions of the parties. At any rate (again with the possible exception of the teleologists, whose views are discussed further on) no one would affirm the opposite proposition, that it would be a proper outcome of interpretation to bring about something not within the intention of the parties. The question remains, however, how is the desired end to be achieved, and where is the authentic expression of these intentions primarily to be looked for? The issue resolves itself very largely into one of approach. One method (and perhaps the one that has the most direct natural appeal) is to ask the question 'What did the parties intend by this clause?' This approach has, however, been felt to be unsatisfactory, if not actually unsound and illogical, for a number of reasons[1] of which the chief may be summarized as follows:

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[1] See, for instance, in the proceedings of the Institute of International Law during the period 1950–56, *Annuaire*, vols. 43–46, *passim*; and see also Sir Hersch Lauterpacht's article entitled 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' in this *Year Book*, 26 (1949), p. 48.

[2] i.e. which professes to ignore intentions as such, and to look only to the apparent objects and purposes of the treaty.

(i) It begins by assuming, or at any rate suggesting, what has yet to be established, namely that the intention of the parties is not clear on the face of the text.[2]

(ii) It ignores the fact that the treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended[3] by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended. It may be quite true, as Judge Anzilotti said in the *Night Work*[4] case, that 'the words have no value except as an expression of the intention of the parties'; but it is no less true that it was precisely in order to express that intention that the words were chosen, and for this reason, and in that sense, they have value and significance in themselves, without reference to anything extraneous.

(iii) The very expression 'the intentions of the parties' is unsatisfactory, for two reasons. The first, which is peculiar to the case of general multilateral conventions, is that many of the parties will or may have joined by subsequent accession, not having taken any part in the original framing of the text, and must be assumed to have joined not so much on the basis of what the actual framers 'intended' as on the basis of what the text itself says and apparently means. Secondly—and this applies to all cases—the aim of giving effect to the intentions of the parties means, and can only mean, their *joint* or *common* intentions. But where there is a dispute about interpretation of the kind that an international tribunal is called upon to resolve, not only will the parties be placing different interpretations on the text, but they will, by reason of that very fact, be professing different intentions in regard to it—which is to say that they will be professing to have had different intentions from the *start*; for clearly the correct interpretation of a treaty cannot be affected by a subsequent change of attitude or intention by one or more of the parties only.[5] This means that, faced with a disputed interpretation, and different professions of intention, the tribunal cannot in fact give effect to any intention which both or all the parties will recognize as representing their common mind. Except in those cases (and they rarely occur on the international plane) where it is manifest that the parties were never *ad idem*, so that there was no contract—i.e. the 'treaty' is void *at initio*—this leaves the tribunal with only two possible courses open to it. Clearly, it cannot be legitimate, in deciding on a basis of law, to give effect to the alleged intentions, as *such*, of one party only, or of a group of parties, for that would amount to making a value judgment that the one set of intentions was 'better' or more desirable than the other. There can be no legal basis for a finding of this kind, however much it might appear desirable on other grounds. In these circumstances, the tribunal must either decide what the text in fact means, and in effect ascribe a common intention to the parties accordingly, whether they profess to have had it or not; or else it must seek a common intention in, or derive it from, the apparent objects and purposes of the treaty. (This last is the teleological method of interpretation about which more will be said presently.) In each case, however, although the finding can thus be related to the question of 'intentions', it really proceeds on an independent basis—that is to say it could be arrived at without any specific pronouncement on, or even investigation of those intentions: this is so even where textual ambiguities, *lacunae* or obscurities may justify or compel reference to *travaux préparatoires*, for, like the treaty itself, the *travaux préparatoires* can be examined not so much in order to discover specifically what the parties intended, as what the resulting treaty text must be taken to mean, or (on the teleological footing) what the objects and purposes of the treaty apparently were. This leads to the last principal objection to the intentions method of interpretation.

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[1] A full statement of these is contained in the 1951 article, pp. 3–6 and 14–17.

[2] The mere fact that there is a dispute about the meaning is not a conclusive indication of obscurity or ambiguity, as is shown by the number of times international tribunals have found disputed texts to be perfectly clear on the face of them.

[3] It may be different if there is direct evidence that the parties used ordinary terms in an unusual or special sense, as in the classic private law case of the man who made a will leaving 'all to mother', but it was proved that by 'mother' he meant the mother of his own children, i.e. his wife.

[4] *P.C.I.J.*, Series A/B, No. 50, p. 383.

[5] Except perhaps in the rather special case considered later, at the end of the discussion on Major Principle V (of Subsequent Practice) under the head of 'Status of the principle'.

(iv) It does not really resolve the difficulty that may arise from the textual or teleological approaches in those cases where the text is not reasonably clear as to meaning or object. It merely throws that difficulty back a stage further, for the same difficulty or obscurity may, indeed usually will, arise over ascertaining what the intentions themselves, in the sense of joint or common intentions, really were; and if the *travaux préparatoires*, or surrounding circumstances, are examined, the examination will equally have to be made with a view to elucidating the text or establishing the real object and purpose of the treaty. This is why the divergence of view between the 'intentions' school of thought and the others is not *primarily* a divergence as to the propriety or otherwise of consulting *travaux préparatoires* or having regard to surrounding circumstances.[1] All schools of thought admit such recourse to be proper and even necessary in certain cases, though they may differ as to when it is in fact necessary. But even when agreed as to that, the divergence still remains at the new level, as to what is to be the direct purpose of the ensuing investigation.

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[1] This is often thought to be the case, but it probably is so only in the sense that the 'intentions' school is more prone to have recourse to extraneous evidence, and might, for instance, be said to turn almost instinctively to the *travaux préparatoires*; whereas the textual school seeks to avoid this, unless forced to it by textual obscurity or ambiguity.

For these reasons and others set out in the 1951 article, a sounder and more scientific method of approach would seem to be one which, while not exactly ignoring the question of intentions, lays the chief emphasis elsewhere, or alternatively attempts to give effect to intentions by methods other than a direct investigation of them as such. To put the matter in epigrammatic form, the question is, on this view, not so much one of what meaning is to be attributed to the text in the light of the intentions of the parties, as of what the intentions of the parties must be presumed to have been in the light of the meaning of the text they drew up. If this were not the case, it would logically involve that, after only a cursory reading of the text, interpretation would begin with an independent investigation, *ab extra*, of the intentions of the parties; and only after these had been ascertained and established would the text be seriously considered, and its meaning and effect finally determined. In actual fact this is never the *modus operandi*. Interpretation starts, as it must, with a careful consideration of the text to be interpreted. This is so because the text *is* the expression of the will and intention of the parties. To elucidate its meaning, therefore, is, *ex hypothesi*, to give effect to that will and intention. If the text is not clear, recourse must be had to extraneous sources of interpretation: but the object is still the same—to find out what the text means or must be taken to mean. No doubt in so doing the tribunal will take account of any reliable material indicative of what the parties were intending, in so far as this material evidences a joint or common intention on their part; but the end result is always the same—that the text has a certain meaning, on the basis of which the parties have certain rights and obligations, and therefore that this is what they must have intended in concluding the treaty.

(*b*) *The teleological approach.*[1] This is a method of interpretation more especially connected with the general multilateral convention of the 'normative', and, particularly, of the sociological or humanitarian type. The charters or constitutive instruments of international organizations may also be placed in this category. Or, to put the matter negatively, it is particularly with reference to this type of convention (now a much more prominent feature of the international scene than it used to be) that doubts have been felt as to the validity, or even practicability, of interpretation by the traditional method (as derived from practice in regard to private law contracts) of ascertaining the intentions of the parties—(see the 1951 article, pp. 3–4). The textual school, as has been seen, is, in general, content to resolve this difficulty on the basis that the intention (which is itself something that—

[1] For a fuller account see the 1951 article, pp. 7–8 and 13–14.

as a joint or common conception—only emerges after a more or less elaborate process of negotiation) is actually expressed and embodied in its final form in the text arrived at: consequently there is no occasion to look further, unless patent ambiguities, obscurities, or *lacunae* render a textual interpretation virtually impossible. The teleological approach goes much further than this, and, at any rate in its more extreme forms, virtually denies altogether the direct relevance of intentions as such: whatever the intentions of the parties or some of them may have been, the convention as framed has a certain object or purpose, and the task of the tribunal is to ascertain and establish this object or purpose, and then to interpret the treaty so as to give effect to it. This process might well amount in practice to a species of judicial legislation; for, according to the more extreme form of the approach, it is not only legitimate but necessary—if it will promote the presumed objects of the convention—that the tribunal should fill in gaps, correct errors, and even, in effect, amend the text in order to remove undesirable ambiguities or obscurities.

(*c*) *The theory of 'emergent purpose'*. This phrase was used by the present writer in the 1951 article[1] in order to describe a still more extreme and dynamic form of the teleological approach, according to which the notion of object or purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention.[2] At any given moment, the convention is to be interpreted not so much, or not merely, with reference to what its object was when entered into, but with reference to what that object has since become and now appears to be. Alternatively, the object is only implicit in the convention as originally drafted: it only emerges, and so to speak declares itself, with the passage of time. Whatever the attractions of this idea, it is clear that the process in question is a legislative rather than an interpretative one, and must involve the assumption of a quasi-legislative function by any tribunal that embarks on it of set purpose and in a conscious and deliberate way.[3] The Court has shown plainly that in its view the performance of such a function cannot properly form part of the interpretative process. Yet there is no doubt that an element of teleology does enter into interpretation and finds, within limits, a legitimate place there and, as will be seen later, there is even a sense in which legitimate expression can be given to the concept of emergent purpose.

(*d*) *Affiliations of the teleological approach.* The teleological school of thought has affinities with both the others. On the one hand, it agrees with the textual school in thinking that a treaty is to be interpreted primarily in and with reference to itself, rather than with reference to what has or may be supposed to have taken place in the minds of its makers. On the other hand, it is but a step from asking what is the object and purpose of a treaty, to asking what its object and purpose were intended to be. For this reason, while the teleologist himself has little direct regard for intentions as such, the intentionist finds himself quite at home among the teleologists: there is always a tendency for an inquiry as to what the framers of the treaty intended to develop into one as to what object they had in view, and from this to conclude that the treaty has a certain purpose, in the light of which all its clauses must be interpreted. The teleologist reaches the same position by a different road, and his approach is in many ways an 'intentions' approach at a different level. It is left largely to the textual school to insist that while a treaty should, so far as its terms will allow, be interpreted in such a way as to give effect to its apparent intention, and to achieve what seem to be its objects and purposes, it cannot be stretched to cover more than, on the natural and ordinary meaning of its terms, it does cover, or enlarged to contain what it does not contain; and that if the parties have failed correctly to express their intention in it, or if the apparent object cannot be achieved on the basis of the actual terms of the treaty, the correct, and only correct, remedy is for the parties to amend or supplement it, but that this cannot be the proper function of a tribunal carrying out a purely interpretative task. As the Court has said[1]: 'It is the duty of the Court to interpret . . . Treaties, not to revise them.'

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[1] p. 8, n. 2.

[2] There is a certain analogy here with the undoubted fact that in many countries the constitution, even where of a rigid or written type (as in most Federal States) has undergone a process of development, much of it as the result of pronouncements by the courts.

[3] It was this feature (of deliberation) that was so striking in the earlier pronouncements of certain Judges of the Court (see 1951 article, pp. 13–14). A limited and largely unconscious legislative element enters perforce into the work of most tribunals, domestic or other.

(2) THE COURT'S GENERAL ATTITUDE TO TREATY INTERPRETATION

With regard to the various theories briefly discussed above, the Court's attitude as it seemed to result from the decisions and opinions given up to 1951 may be summarized as follows (a fuller statement is contained in the 1951 article, pp. 6–8):

(*a*) the Court, without denying the validity or relevance of the intentions of the parties, or refusing in certain circumstances to inquire into these, has not normally approached the task of interpretation from that point of view, but has, rather, favoured an approach based primarily on an elucidation of the text, following in this respect the practice of the former Permanent Court of International Justice;[2]

(*b*) in elucidating texts, the Court has proceeded mainly on the basis of the principle of the 'natural and ordinary meaning' of terms 'in the context in which they occur':[1] only if 'the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result' can the Court, 'by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words';[2]

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[1] *Peace Treaties* case (2nd Phase), in *I.C.J. Reports*, 1950, p. 229.

[2] Cf. the pronouncement of the Permanent Court in the *Polish Postal Service in Danzig* case (*P.C.I.J.*, Series B, No. 11, p. 39), cited by the International Court in the (*Second*) *Admissions* case (*I.C.J. Reports*, 1950, p. 8; and see 1951 article, pp. 10–11).

(*c*) so far as it may be possible to do so without departing from the natural and ordinary meaning, or doing violence to the actual terms of the treaty, or reading into it terms that are not there, the Court has been ready, through the principle of effectiveness, to have regard to the apparent objects and purposes of the treaty, in interpreting its terms;

(*d*) by means of the principle of subsequent practice the Court has in effect opened the door to a predominantly teleological element of interpretation in so far as the practice of the parties in applying and operating the treaty may be evidence of what its real object and intention is, and hence a guide to the true meaning of its terms.

The attitude thus manifested in the decisions and opinions given up to 1951 appears to have been maintained in the period 1951–4 now under review

(3) AUTHOR'S RE-FORMULATION OF THE MAJOR PRINCIPLES OF INTERPRETATION IN THE LIGHT OF THE COURT'S WORK DURING THE PERIOD 1951–4

On the basis of the previous period, these principles seemed to be as set out on p. 9 of the 1951 article. Subsequent reflexion and further consideration in the light of the Court's 1951–4 work, and also of the Resolution adopted by the Institute of International Law at its Granada Session in 1956,[3] while not affecting the substance of these principles, suggests certain

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[1] This qualification, or rather completion, removes the element of undue rigidity or narrowness that might otherwise attach to the concept of the natural and ordinary meaning. Its significance is explained on pp. 11 and 18 of the 1951 article, and see below, head (*a*) under 'Miscellaneous points arising in connexion with Major Principles I and II'.

[2] The quotations are from the (*Second*) *Admissions* case (above, p. 209, n. 2). The last shows in what way the Court admits recourse to an inquiry into 'intentions'.

[3] This Resolution (see *Annuaire*, vol. 46, pp. 358–9 and 364–5), the text of which is set out below, itself reflects the work of the Court during the previous seven or eight years, and also a number of the ideas suggested in the 1951 article of the present writer, who acted as Rapporteur for this subject at Granada in lieu of the previous Rapporteur, Sir Hersch Lauterpacht, who had in the meantime become a Judge of the Court. The Resolution is as follows:

Article 1

1. The agreement of the parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.

2. If, however, it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced.

Article 2

1. In the case of a dispute brought before an international tribunal it will be for the tribunal,

rearrangements, and some expansions and changes of wording. These principles are accordingly now re-formulated as follows:

I. *Principle of Actuality* (*or Textuality*). Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

II. *Principle of the Natural and Ordinary Meaning.* Subject to Principle VI below, where applicable, particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur. This meaning can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one, or if such an interpretation would lead to an unreasonable or absurd result. Only if the language employed is fundamentally obscure or ambiguous may recourse be had to extraneous means of interpretation, such as consideration of the surrounding circumstances, or *travaux préparatoires*.

III. *Principle of Integration.*[1] Treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.

Subject to the foregoing Principles

IV. *Principle of Effectiveness*[2] (*ut res magis valeat quam pereat*). Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.

V. *Principle of Subsequent Practice.*[3] In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.

while bearing in mind the provisions of the first article, to consider whether and to what extent there are grounds for making use of other means of interpretation.

2. Amongst the legitimate means of interpretation are the following:

(*a*) Recourse to preparatory work;
(*b*) The practice followed in the actual application of the treaty;
(*c*) The consideration of the objects of the treaty.

[1] This principle, which was formerly grouped with No. IV as subordinate to Nos. I and II, seems in fact to be an independent principle.

[2] The status of subordination for this principle must be retained, for reasons given elsewhere in this article, and because of the very explicit *dictum* of the Court in the *Peace Treaties* case (see below, subsection (4), towards the end of 'Major Principle IV').

[3] This can of course be regarded merely as one of the extraneous means of interpretation, recourse to which may be permissible in the circumstances stated under Principle II. But for the reasons given later (see subsection (4) below, under 'Major Principle V'), it is difficult to regard it as doing no more than qualify that principle, though it is in a certain sense subordinate to it.

> *Footnote to this Principle.*[1] Where the practice has brought about a change or development in the meaning of the treaty through a *revision* of its terms by conduct, it is permissible to give effect to this change or development as an agreed revision but not as an interpretation of its original terms.

To the above principles may now be added, on the basis of certain pronouncements made in the 1951–4 period, a sixth major principle, as follows:

> VI. *Principle of Contemporaneity.* The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.

This last principle could perhaps be regarded as constituting in a sense no more than a qualification to the principle (No. II) of the natural and ordinary meaning. But, on account of its affinities with the principle of the inter-temporal law and for other reasons (see below, subsection (4)), it seems to go beyond that, and to merit the status of an independent principle of interpretation.

(4) PRONOUNCEMENTS OF THE COURT ON THE MAJOR PRINCIPLES OF INTERPRETATION DURING THE 1951–4 PERIOD

Major Principle I (of Actuality, Textuality)

A clear affirmation of the principle of actuality, that texts must be interpreted as they stand, and, *prima facie*, without reference to extraneous factors, was made by the Court in the *Iranian Oil* case, where it said (*I.C.J.*, 1952, p. 105) regarding the text in issue

> 'This Declaration[2] must be interpreted as it stands, having regard to the words actually used.'

Again, the Court's insistence on interpreting texts according to what they actually say rather than according to what might, or, on a certain view, could be read into them by implication, was exemplified in the *Morocco* case. It being admitted that at the date when a certain Convention (the Madrid Convention of 1880) was concluded, foreign countries possessed the right to exercise consular jurisdiction in respect of their nationals in

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[1] This idea is tentative. It is not based on any finding of the Court itself, but constitutes an attempt to suggest the appropriate juridical basis for certain ideas expressed by some of the Judges in the period up to 1951 (see 1951 article, pp. 13–14) which, properly understood, seem to merit consideration.

[2] This was the Declaration of Iran accepting the compulsory jurisdiction of the former International Court (and hence, by virtue of Article 36, paragraph 5 of the Statute of the Permanent Court, the jurisdiction of the latter) in respect of disputes about a certain category of treaties. The Court and the individual Judges treated it as being subject to the same rules of interpretation as a treaty proper.

Morocco, the question was whether this Convention by *regulating* the exercise of this right, *perpetuated* it in the sense of establishing it on a basis independent of, and separate from, the original grant of consular jurisdiction, in such a way that even if this grant, as such, should determine, the right would nevertheless continue on the basis of the Convention. The Court found in regard to 'the then existing system of consular jurisdiction' that there were no provisions of the Convention 'which *expressly* [author's italics] brought about . . . its establishment' as an independent and autonomous right', while, on the other hand, the purposes and objects of the Convention, as declared in it, were simply to establish 'on fixed and uniform bases, the *exercise* [author's italics] of the right of protection . . . and of settling certain questions connected therewith . . .'. The Court then went on to say (*I.C.J.*, 1952, p. 196):

> 'In these circumstances, the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the Convention. The Court, in its Opinion—Interpretation of [the] Peace Treaties (Second Phase) . . . stated: "It is the duty of the Court to interpret the Treaties, not to revise them."'

A little later in the same case (ibid., p. 199) this principle was, in effect, reaffirmed:

> 'The Court can not, by way of interpretation, derive from the Act [of Algeciras] a general rule . . . which it does not contain.'

Judge Read, in the *Iranian Oil* case, affirmed the same principle in not dissimilar terms (*I.C.J.*, 1952, p. 145):

> 'The second[1] principle is equally important. It is my duty to interpret the Declaration[2] and not to revise it. In other words, I cannot, in seeking to find the meaning of these words, disregard the words as actually used, give to them a meaning different from their ordinary and natural meaning, or add words or ideas which were not used in the making of the Declaration.'

Major Principle II (*of the Natural and Ordinary Meaning*)

Judge Read, in the *Iranian Oil* case (ibid., p. 142), specifically reaffirmed this principle, recalling and quoting *verbatim* the original passage from the *Second Admissions* case (*I.C.J.*, 1950, p. 8) in which it had been laid down by the Court itself,[3] and continued (p. 145) in language which in terms adduced as part of the *rationale* of the principle (and indeed also of Principle I) the fact that the will of the parties is presumed to have been expressed in the text they have framed, and is therefore primarily to be determined by reference to that text:

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[1] Judge Read's first principle was that of the natural and ordinary meaning.

[2] See p. 212, n. 2, above.

[3] 1951 article, pp. 10–11.

> '. . . the will of the parties . . . was expressed in the words used, and in order to determine it, the first[1] principle must be applied. It is necessary to give effect to the words used in their natural and ordinary meaning in the context in which they occur.'

The Court itself, equally, in the *Morocco* case, by implication reaffirmed the principle (*I.C.J.*, 1952, p. 195):

> 'These are words which, if given their ordinary and natural meaning, state the consideration which led to the making of the surrender [sc.] of consular jurisdiction, but they are not words which would normally be used if it was intended to make a conditional surrender.'

In the first phase of the *Ambatielos* case also, the Court rejected a suggested interpretation on the ground (*I.C.J.*, 1952, p. 41) that it

> '. . . introduces a distinction for which the Court sees no justification in the plain language of the Declaration.'

Similarly, the jointly dissenting Judges (McNair, Basdevant, Klaestad and Read) in the *Ambatielos* case (2nd Phase), explicitly reaffirmed the same principle in the following language (*I.C.J.*, 1953, p. 30):

> 'These words should be construed in their natural and ordinary meaning, as has been said over and over again and, in particular, in the Advisory Opinion of the Court in the [(*Second*) *Admissions*] case . . ., (see above, subsection (2) (*b*)).

Miscellaneous points arising in connexion with Major Principles I and II

(*a*) *Scope of the concept of the natural and ordinary meaning—does not imply narrowness or denote only the literal meaning—the result must be a reasonable result.* On pages 10 and 11 of the 1951 article it was shown that by the natural and ordinary meaning, the Court did not intend to denote the *literal* meaning, or to adopt a canon of interpretation that would lead to absurd or unreasonable results.[2] This attitude was maintained in the 1951–4 period, in language indicating both that the Court aims at reaching a reasonable finding, and that in determining what is reasonable, it is ready to have regard to evidence of intention. Thus in the *Iranian Oil* case, the Court said (*I.C.J.*, 1952, p. 104) that it could not

> '. . . base itself on purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.'[3]

A similar attitude was taken up by Judge Read in the same case (ibid., p. 146):

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[1] See p. 213, n. 1, above.

[2] See under subsection (2) (*b*) above, and p. 210, n. 1.

[3] This is virtually the only case in which the Court appears to have argued directly from intentions to text. But there is evidence elsewhere (see § 2, subsection (2) (iii) below) that the Court, while applying the rules of treaty interpretation to Iran's Declaration generally, regarded a Declaration accepting the Court's compulsory jurisdiction as constituting in some sense a special case. Admittedly, the element of intention is of particular importance in this class of case.

> 'It is of course true that the drafting of the Declaration was imperfect; and that it is possible by purely grammatical argument, to attribute a different and unrealistic meaning to this expression. But I cannot rely on purely grammatical interpretation. While the grammatical construction may be open to criticism, there can be no real doubt as to what the draftsman had in mind when he deliberately interpolated the expression "directly or indirectly" in the middle of the text. He certainly meant to ensure that the scope of the Declaration should be broadened so as to cover disputes and facts having an indirect relationship with the treaties or conventions in question.'

(*b*) *Factors justifying departure from the natural and ordinary meaning—'special reasons'*. In the *Iranian Oil* case, following on the passage from its judgment cited in (a) above, the Court found that a certain interpretation constituted 'the natural and reasonable way of reading the text', and went on to say that it would require 'special and clearly established reasons' to justify another interpretation. In the given case, the Court found that no such special reasons existed, but the principle remains, and is apparent equally from the statement made in the jointly dissenting opinion of Judges Hackworth, Badawi, Carneiro and Read in the *Morocco* case (*I.C.J.*, 1952, pp. 227–8), to the effect that

> 'If the natural sense . . . yields a coherent and reasonable proposition, then this proposition can only be set aside if sufficient evidence is adduced to prove that it could not have been contemplated.'

The above quoted passages justify the conclusion that, while the natural and ordinary meaning, when leading to a reasonable result, will not easily be displaced, the concept is nevertheless not a rigid or absolute one, to be followed even in the case of clear evidence that it does not represent the real meaning.

(*c*) *Recourse to extraneous evidence—Surrounding circumstances—Travaux préparatoires—Ambiguities*. As Judge Levi Carneiro said in the *Minquiers* case (*I.C.J.*, 1953, p. 87):

> 'When a text is not clear, the circumstances in which a treaty was signed and the subsequent facts relating to its application . . . provide a sound basis for the interpretation.[1] In the present case, the interpretation may also be based on other circumstances.'

The case considered in subsection (b) above contemplates the situation in which there is already material before the tribunal which does or may, or is said to be such as to, lead to the conclusion that although the text has a natural and ordinary meaning according to its actual language, it should nevertheless, in the given case and for special reasons, not be understood in that sense. The present case is a different one, and postulates that the text is ambiguous, and does not yield any single clear and unequivocal meaning, taken in its natural and ordinary sense. This may be because it does not yield any clear meaning at all, or, as is more probable, because it is capable of yielding two or more possible, and not unreasonable, renderings. Thus, Judge McNair, speaking of the two possible interpretations of the text at issue in the *Iranian Oil* case, said (*I.C.J.*, 1952, pp. 117–18):

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[1] A more accurate rendering of the original French would be 'When the text is not clear, the elements of a sound interpretation must be found in the circumstances in which a treaty was signed, and the subsequent facts relating to its application.'

> 'Both interpretations are grammatically possible . . . Moreover both are possible as a matter of substance; both make sense though the effects of the two interpretations are quite different. In short, there is a real ambiguity in the text, and, for that reason, it is both justifiable and necessary to go outside the text and see whether any light is shed by surrounding circumstances.'

(*d*) *The nature of an ambiguity.* This *dictum* of Lord McNair is interesting, not only as showing the sort of circumstances in which recourse to extraneous and non-textual sources of interpretation may be justified, but also for the light it throws on the sense in which the concept of an ambiguity should be understood for this purpose. There are perhaps few texts to which it is not *possible*, by a greater or lesser degree of manipulation of language, to attribute more than one not implausible meaning, even if one of them is strained or otherwise improbable. If this were a ground for immediate recourse to extraneous sources of interpretation, the principle of interpreting texts as they actually stand, and according to the natural and ordinary meaning of their terms, in the context in which they occur, would have little scope or reality. It is therefore not sufficient in itself that a text is *capable* of bearing more than one meaning. These meanings must be equally valid meanings, or at any rate, even if one may appear more possible and likely than the other, both must attain a reasonable degree of possibility and probability, not only grammatically but as a matter of substance and sense. Only then, in the words of Lord McNair, will there be 'a real ambiguity in the text' such as to justify and necessitate recourse to extraneous material. His emphasis on such recourse being not only justifiable but 'necessary' in these circumstances, points in the same direction, for an ambiguity of this kind can only be cleared up by such recourse, whereas a lesser kind of 'ambiguity' can usually be resolved on the basis of the text alone.

(*e*) *Recourse in particular to travaux préparatoires.* The basic principle was enunciated by the Court in the *Ambatielos* case (1st Phase) as follows (*I.C.J.*, 1952, p. 45):

> 'In any case where, as here, the text to be interpreted is clear, there is no occasion to resort to preparatory work.'

But in the *Morocco* case, on a complicated question of the correct method of valuing certain imports for customs purposes under Article 95 of the Act of Algeciras, the Court found (*I.C.J.*, 1952, p. 209) that:

> 'It cannot be said that the provisions of Article 95 alone, or of Chapter V of the Act

> considered as a whole, afford decisive evidence in support of either of the interpretations contended for by the parties respectively.'

Consequently (ibid.), the Court 'has examined the earlier practice, and the preparatory work of the Conference of Algeciras of 1906'. A detailed exposition of the results followed. The jointly dissenting Judges in the same case (Hackworth, Badawi, Carneiro and Rau), although considering (p. 229) that 'the text of Article 95 presents no ambiguity'), went on to say that 'Assuming that the text is ambiguous, the examination of the *travaux préparatoires* might throw some light on its interpretation' and proceeded to an examination accordingly.[1] It is, however, noteworthy in view of what has been said above in subsection (1) (iv), as to the frequently unsatisfactory and inconclusive results of recourse to *travaux préparatoires* (and see the 1951 article, pp. 15–17), that in this case, one of the few in which the Court has carried out a more or less detailed investigation into preparatory work, not only did the Court and the four-judge dissenting minority arrive at different conclusions about the effect of the preparatory work, just as they had done about the text of Article 95 itself, but the Court also expressly stated that 'not much guidance is obtainable from these sources'. The result of each examination was in fact merely to confirm the conclusions already reached on the basis of a consideration of the text of Article 95 alone. Thus, having found, as indicated above, that Article 95 was, on its text, inconclusive, and did not decisively support the view of either party, and having examined the preparatory work of the Act of Algeciras, and the subsequent customs practice in Morocco, and having also found these inconclusive, and 'not always . . . consistent', the Court, reverting to Article 95, concluded (ibid., p. 211):

> 'In these circumstances the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case.'

The jointly dissenting minority, on the other hand, having found that the text of Article 95 was not ambiguous, but having nevertheless proceeded to examine the *travaux préparatoires* and customs practice in case their view that there was no ambiguity was wrong, held (ibid., p. 233) that these pointed to the same conclusion as the text of Article 95, according to the meaning which the dissenting minority considered it unambiguously possessed on its actual language—namely, that the only value to be taken into account was the value of the goods in the country of origin plus the cost of transportation as far as the customs-house in Morocco.[2]

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[1] This was actually superfluous, since the dissenting minority had found the text to be clear and unambiguous. Strictly, the *travaux préparatoires* were only used to *confirm* the interpretation already arrived at.

[2] For the purposes of the present discussion, it is, of course, immaterial which interpretation of Article 95 was the better one, and no opinion on that point is expressed here.

(*f*) *Certain cases in which direct recourse to travaux préparatoires or extraneous documents, instruments or circumstances may be legitimate despite the unambiguity of the text:*

(i) *Where the object is not the interpretation of the text as such, but the ascertainment or establishment of a point of substance in relation to the Treaty.* Thus in the case of *Reservations to the Genocide Convention*, the Court had recourse to the *travaux préparatoires* of the Genocide Convention, not in order to interpret or elucidate any particular provision of the Convention, but in order to determine whether, in relation to the Convention as a whole, there existed any right for the parties to enter unilateral reservations to it on signature, ratification or accession—this depending (in the Court's view) partly on whether the circumstances indicated the existence of some implied or tacit understanding to that effect.[1] Accordingly the Court said (*I.C.J.*, 1951, p. 22):

> 'Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that a faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. . . .
>
> Even more decisive in this connexion is the debate on reservations in the Sixth Committee [of the United Nations General Assembly] at the meetings . . . which immediately preceded the adoption of the Genocide Convention. Certain delegates clearly announced that their governments could only sign or ratify the Convention subject to certain reservations.'[2]

In the same way, in the first phase of the *Ambatielos* case (*I.C.J.*, 1952, pp. 30 et seq.), when the issue was whether a certain Declaration accompanying a treaty was interpretative of the treaty, and therefore 'part' of it, the Court had regard not only to the texts but also to a number of extraneous factors (see further below, Division B, § 1, subsection (4)).

(ii) *Where a number of instruments are part of a single complex or whole.* In the 1951 article (pp. 12–13), attention was drawn to pronouncements to the effect that where a treaty had been accompanied by instruments, or by *agreed*[3] statements specifically recorded or embodied in the minutes, declaring the understanding of the parties as to the sense in which the text or some part of it should be read, these must be regarded as in effect one with the treaty itself, so that recourse to them would not strictly constitute recourse to extraneous matter. Exactly the same point was made in the first phase of the *Ambatielos* case where in considering the status and effect of a Declaration accompanying a certain Treaty, the Court said (*I.C.J.*, 1952, p. 44) that:

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[1] See further below, Division B, § 2, subsection (3) (*b*).

[2] The fact that the jointly dissenting minority (Judges Guerrero, McNair, Read and Hsu Mo) directly disagreed that this was the effect of the discussions (*Report*, pp. 40–41), does not, of course, affect the principle involved. It does, however, afford another example of recourse to *travaux préparatoires* merely reproducing the same disagreements that have already arisen on the face of the text.

[3] As indicated in the 1951 article, p. 12, n. 1, a unilateral statement by one party or delegation as to the way in which it intended to interpret a certain clause would not have this effect, unless clearly accepted by the others—or as *against* the party making it.

> '. . . the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty . . .'

This point is considered again later in Division B below (§ 1, subsection (4) (*d*)). Another application of the same principle was made by the Court in the *Morocco* case,[1] where it was a question of interpreting a particular instrument (a Franco-Spanish Declaration of March 7th, 1914) that was only one of a number of similar instruments concluded with various different countries. The question was whether the words 'renonce à réclamer', in the instrument concerned, involved a final renunciation of certain rights, or whether they involved merely a temporary undertaking not to claim such rights so long as certain conditions remained in existence. The Court said (*I.C.J.*, 1952, pp. 195–6):

> 'The Declaration made by France and Spain . . . was one of a series of agreements negotiated by France with more than twenty foreign States. . . . At least seventeen of these used agreements used the expression "renonce à réclamer" as a means of bringing about a complete abrogation of all rights and privileges arising out of the régime of capitulations.'

After observing that, following on this, all the States concerned had forthwith abandoned the exercise of consular jurisdiction, and other capitulatory rights and privileges in the French Zone of Morocco, the Court concluded that in these circumstances it was necessary to hold that the Spanish Declaration of March 7th, 1914 equally 'brought about the surrender of all Spanish jurisdictional or other extraterritorial rights in the French Zone . . .'.

(iii) *Where extraneous documents, instruments or circumstances serve to confirm an interpretation already arrived at on the text.* The case just instanced illustrates this point also. The Court having found (in the *Morocco* case) that the words '*renonce à réclamer*' 'must be regarded as an out and out renunciation of the capitulatory rights and privileges', continued (*I.C.J.*, 1952, p. 195):

> 'This view is confirmed by taking into account the declarations and other arrangements made by France with other interested Powers designed to bring about the surrender of their jurisdictional and other extraterritorial rights in the French Zone.'

Similarly, the jointly dissenting minority[2] in the *Ambatielos* case (2nd Phase) after having affirmed the principle of the natural and ordinary meaning,[1] and stated what in their view, a particular passage meant on that basis, added (*I.C.J.*, 1953, p. 30):

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[1] See also the remarks of Judge Levi Carneiro in the *Ambatielos* case (1st Phase), *I.C.J.*, 1952, pp. 52–53, which are referred to later (below, Division B, § 1, subsection (4) (*d*), and § 2, subsection (1), p. 273, n. 2)).

[2] See above, under 'Major Principle II', and passage there quoted.

> 'A reading of the Declaration as a whole confirms the view that the natural meaning of the words used corresponds to the purpose which the Parties had in mind.'

Here, the process of inquiry into the intentions of the parties, as well as into other passages in the instrument in question, was in effect employed to *confirm* an interpretation already arrived at on the basis of the natural and ordinary meaning of the text. The matter can perhaps be summed up by saying that if a text is clear on its language, extraneous factors may be cited or invoked in order to confirm, but not in order to change the meaning already arrived at.

Major Principle III (*of Integration*)

The Court did not have occasion during the present period to pronounce directly on this matter, but that its natural approach is to consider treaties, or particular sections of treaties, as a whole can be seen from certain passing references to the point—for instance in the *Morocco* case (*I.C.J.*, 1952, p. 209), 'the provisions of . . . Chapter V of the Act [of Algeciras] considered as a whole, [do not] afford decisive evidence . . . etc.' and *per* the jointly dissenting minority[2] in the *Ambatielos* case (2nd Phase), 'A reading of the Declaration as a whole confirms the view . . . etc.' (*I.C.J.*, 1953, p. 30). In the *Reservations* case, however, the Court discussed the related question of the *integrity* of a treaty, from the standpoint of whether reservations should be permitted to it in the interests of the universality of its acceptance, even though this had the effect that the treaty would not apply as the same integral whole to all the participating countries. This aspect of the matter is considered later (Division B, § 2, subsection (3) (*d*)); but, in general terms, and while considering that the Genocide Convention constituted a special case to which the principle was not wholly applicable, the Court (*I.C.J.*, 1951, p. 21) referred to the 'undisputed value as a principle' of the 'traditional concept . . . that no reservation was valid unless it was accepted by all the contracting parties . . .', a concept which was itself derived from 'the notion of the integrity of the convention as adopted'. Amongst other applications of the principle thus approved by the Court, would clearly figure that of the *interpretation* of the convention or treaty as an integral whole.

Major Principle IV (*of Effectiveness*)

The Court made an application of this principle in the *Ambatielos* case (1st Phase). A new commercial treaty between Greece and the United Kingdom had superseded a previous one, but a Declaration entered into at the same time as the new treaty contained a saving in respect of claims based on the old treaty, which, it was stated, were to be referred to arbitration in the manner provided by that treaty. The Court rejected the United Kingdom contention that this Declaration only related to (and provided a saving for) existing claims, already formulated under the old treaty before the Declaration was signed, and had no continuing application to subsequent claims that might be brought after the signature of the Declaration, even if these were formulated under the old treaty and related to events that occurred when it was still in force.[1] Apart from the fact that the Court could find nothing on the face of the text to warrant this view—the text referring generally and without qualification to 'claims based on the provisions of the Anglo-Greek Commercial Treaty of 1886'—it considered (*I.C.J.*, 1952, p. 45) that:

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[1] See ibid.

[2] Judges McNair, Basdevant, Kleastad and Read.

> 'If the United Kingdom Government's interpretation were accepted, claims based on the Treaty of 1886, but brought after the conclusion of the Treaty of 1926 would be left without solution. They would not be subject to arbitration under either Treaty, although the provision on whose breach the claim was based might appear in both and might thus have been in force without a break since 1886. The Court cannot accept an interpretation which would have a result obviously contrary to the language of the Declaration and to the continuous will of both Parties to submit all differences to arbitration of one kind or another.'

In the same case, Judge Levi Carneiro also applied the principle of effectiveness in coming to the conclusion that the Declaration must, in the circumstances, be regarded as part of the new treaty (the Treaty of 1926), so that any question of its interpretation or application fell under Article 29 of that Treaty, which provided for a determination of all such matters by a reference to the Permanent Court of International Justice, and hence now to the International Court[2] (this was the principal issue in the first phase of the *Ambatielos* case, namely, whether the Court had jurisdiction to determine the character and extent of the United Kingdom's obligation to go to arbitration under the Declaration; this jurisdictional issue depending on whether the Declaration was or was not to be regarded as part of the Treaty of 1926). After having come to the conclusion, on other grounds, that it was, Judge Carneiro (ibid., p. 53) continued

> 'There is another consideration which supports that conclusion: if it were not

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[1] There can be no doubt that whatever its correct interpretation, the Declaration was, on the United Kingdom side, entered into because of and with reference to certain existing claims. This was actually admitted by the Court (see *Report*, p. 43): 'Indeed, the United Kingdom Government, before proceeding to the signature of the Treaty of 1926, asked for an assurance that the Hellenic Government would not regard 'the conclusion of the Treaty' as prejudicing certain claims of British subjects based on that older Treaty'—a clear reference to existing claims.

[2] This resulted automatically from Article 37 of the Statute of the Court which, as the Court put it (*I.C.J.*, 1952, p. 39), 'in effect provides that all references in treaties to the Permanent Court of International Justice must now be construed as references to the International Court of Justice'.

> adopted, there would be no pre-established procedure for the settlement of a dispute between the two Governments on the interpretation and application of the Declaration.
> But such a situation must be avoided. . . .'

Having regard to the fact that the parties had (ibid.) 'concluded two treaties, forty years apart, in the operation of which there was no interruption', and had provided either for arbitration or recourse to the Court under each of these, with, as he and the Court found, the Declaration as a sort of link between these two sets of adjudicatory provisions, Judge Carneiro could not believe that the parties could have contemplated a situation in which there might arise a disagreement about the Declaration itself 'without there being any solution for such disagreement, either by arbitration or by recourse to some organ of international justice' (ibid., p. 54). The principle of effectiveness was also endorsed in the *Iranian Oil* case, Judge Read stating (*I.C.J.*, 1952, p. 143) that:

> 'The making of a declaration is an exercise of State sovereignty and not, in any sense, a limitation. It should therefore be construed in such a manner as to give effect to the intention of the State, as indicated by the words used; and not by a restrictive interpretation, designed to frustrate the intention of the State in exercising this sovereign power.'

From a different point of view, the Court itself, in the same case, also endorsed this principle in connexion with the question whether it was proper to adopt an interpretation of a text which rendered some of its words superfluous, so that the result would have been no different if they had been omitted. While considering that a unilateral Declaration could (and in the given case did) constitute an exception, the Court pronounced itself in general terms in a manner unfavourable to a method of interpretation that would, so to speak, leave certain words in the air (*I.C.J.*, 1952, p. 105):

> 'The Government of the United Kingdom has further argued that the Declaration would contain some superfluous words if it is interpreted as contended by Iran. It asserts that a legal text should be interpreted in such a way that a reason and meaning can be attributed to every word in the text.
>
> It may be said that this principle should in general be applied when interpreting the text of a treaty . . . resulting from negotiations between two or more States.'

In the same case, though with reference to a different passage, Lord McNair was influenced in the meaning he attributed to the term 'treaty' in a certain context by its conjunction with the word 'accepted' which, he thought, showed that agreements specifically entered into, and not arising merely by implication were intended (see Division B, § 1, subsection (1) (*b*) (ii) below). He founded this view partly on the fact (*I.C.J.*, 1952, p. 122) that

> 'Some meaning must be given to the word "acceptés".'

As already indicated (above, subsection (2) (*c*)), it is through the principle of effectiveness that the Court has given its legitimate place to the teleological element in interpretation (objects and purposes). But, as shown on pp. 19–20 of the 1951 article, precisely because of its teleological tendencies, and the danger of falling into judicial legislation that the teleological principle may involve, the Court has subordinated the principle of effectiveness to that of the textual and natural meaning, in the sense that it is never legitimate, even with the object of giving maximum effect to a text, to interpret it in a manner actually contrary to, or not consistent with, its plain meaning. It may be desirable here to recall the very explicit affirmation of this position made by the Court in the *Peace Treaties* case (*I.C.J.*, 1950, p. 229; 1951 article, p. 20):

> 'The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which . . . would be contrary to their letter and spirit.'

Exactly the same point of principle is made in the passages from the Court's decision in the *Morocco* case, and from Judge Read's opinion in the *Iranian Oil* case, quoted above under the head of 'Major Principle I'.

Major Principle V (of Subsequent Practice)

According to this principle[1] (see 1951 article, pp. 20–21), the way in which the parties have actually conducted themselves in relation to the treaty affords legitimate evidence as to its correct interpretation. It is, of course, axiomatic that the conduct in question must have been that of both or all—or, in the case of general multilateral conventions, of the great majority of the parties, and not merely of one.[2] But given that, conduct usually forms a more reliable guide to intention and purpose than anything to be found for instance in the preparatory work of the treaty, simply because it has taken concrete and active, and not merely verbal or paper, form. The uncertainties that so frequently attend on the latter case are more likely to be absent in the former, for in the course of preparatory work the parties merely state what their intentions are: in their practice subsequent to the conclusion of the treaty they act upon them. In any event they act, and a *consistent* practice must come very near to being conclusive as to how the treaty should be interpreted. In the *Morocco* case, the Court, in interpreting Article 95 of the Act of Algeciras, had extensive recourse not only to preparatory work (see above, pp. 216–17) but also to the evidence of subsequent practice, though, as with the preparatory work, without much decisive result, because the practice itself happened in that case to be confused and inconsistent. ('The general impression created by examination of the relevant materials [i.e. practice] is that those responsible for the administration of the customs since the Act of Algeciras have made use of all the elements of valuation available to them, though perhaps not always in a consistent manner.') In the same case, the jointly dissenting minority,[1] who found the evidence more conclusive,[2] said (*I.C.J.*, 1952, p. 231):

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[1] It has other applications, apart from treaty interpretation (see this *Year Book*, 30 (1953), pp. 54–58).

[2] Naturally, the conduct of one party may be evidence *against* that party, but that is really a different matter.

> 'As regards the practice followed in the period subsequent to the Act of Algeciras, the evidence resulting from the documents filed by the Parties is in favour of the interpretation put forward by the United States in respect of the measures adopted during the period 1908–12. It is even decisive in respect of the period following the Protectorate up to 1928.'

In a slightly different way, the Court also applied this principle in the *Iranian Oil* case, in respect of the interpretation of a unilateral Declaration accepting the compulsory jurisdiction of the Court, by giving weight to a law passed by the declaring country between the date of signing the Declaration and the date of its ratification, as showing what the effect of the Declaration was. Referring to a particular clause in the law, the Court said (*I.C.J.*, 1952, p. 107):

> 'This clause . . . is, in the opinion of the Court, a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.'[3]

Status of the principle. As the passage just cited shows, the principle of subsequent practice may, from one point of view, be regarded as part of the principle of confirmation already considered (above, 'Miscellaneous Points', (*f*) (iii)), and in that aspect it must, like the principle of effectiveness, be regarded as being, in general, subordinate to the principle of the textual and natural meaning—that is to say, *prima facie*, it may serve to confirm that meaning if clear, or may afford an extraneous means of elucidating it, if obscure or ambiguous; but not to change or add to it if no obscurity or ambiguity exists and the sense is clear according to the natural and ordinary meaning. Subsequent practice is (on this basis) primarily *one* of the extraneous means (like recourse to *travaux préparatoires*, or consideration of the circumstances existing previous to or when the treaty was drawn up) of interpreting a text not clear in itself; and, considered as such, it is chiefly its superior *reliability* as an indication of the real meaning and effect of a text that justifies its treatment as an independent major principle of interpretation. Yet it is difficult to deny that the meaning of a treaty, or of some part of it (particularly in the case of certain kinds of treaties and conventions), may undergo a process of change or development in the course of time. Where this occurs, it is the practice of the parties in relation to the treaty that effects, and indeed *is*, that change or development. In that sense there is no doubt about the standing of the principle, as an independent principle, which, in a proper case, it may be not only legitimate but necessary to make use of; for what is here in question is not so much the meaning of an existing text, as a *revision* of it, but a revision brought about by practice or conduct, rather than effected by and recorded in writing. That agreement can result from conduct, in the international as well as in the domestic field, admits of little doubt (as to various aspects of this, see below, Division B, § 1, subsections (1) (*a*) and (2) (*b*)). As regards an agreed revision or amendment of treaty terms, if, as already stated, it is, in the language of the Court, the duty of a tribunal 'to interpret treaties, not to revise them', it is equally the duty of a tribunal to interpret them *as* revised, and to give effect to any revision arrived at by the parties. In the last analysis, it seems to be a matter chiefly of the nature and weight of the evidence required to establish the existence of such a revision, whether it results from writing or from practice. Looked at in this way, a legitimate place can be found for the doctrine of 'emergent purpose' discussed earlier (subsection (1) (*c*) above) not as a theory of interpretation, but as a substantive rule of treaty law affecting the revision of treaties—provided always that the application of the doctrine is limited to its proper scope, namely to the case where the 'purpose' clearly emerges as a matter of evidence, on the basis of the acts, practices and conduct of the parties, and is not one supplied or superimposed on the treaty by the tribunal.

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[1] Judges Hackworth, Badawi, Carneiro and Rau.

[2] Another example of the tendency for two opposing views of the meaning of a text to be reflected in similarly opposing views as to the effect of extraneous interpretational material.

[3] Judge Hackworth, on the other hand, did not think the appeal to this Iranian law was legitimate, on the ground that the law (the text of which had not been annexed to Iran's Declaration or ratification or otherwise formally communicated) was a purely domestic, not an international act (*Report*, pp. 136–7). A further important point is involved here which is considered in Division B, § 1, subsection (5) (*b*) below.

Major Principle VI (*of Contemporaneity*)

The principle that treaty terms must be interpreted according to the meaning they possessed, or the sense in which they were normally employed, at the date when the treaty was entered into, is really a particular application of the doctrine of the inter-temporal law, fully discussed in an earlier article[1]—for if it is a rule that the rights of parties to a dispute, as they stood at any given date, must be adjudged on the basis of the law (that is to say according to the state of international law) as it too stood at that date, it follows automatically that, in so far as those rights depend on a treaty, they can only receive a valid determination on the basis of the contemporaneous meaning of the treaty terms at the date of its conclusion, and in the light of current usages and practice at that time. In the period up to 1951, the Court did not have occasion to pronounce on this matter, but the principle was affirmed in the 1951–4 period, in the *Morocco* case (*I.C.J.*, 1952, p. 189):

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[1] See this *Year Book*, 30 (1953), pp. 5–8.

> 'The Treaty of 1836 replaced an earlier treaty between the United States and Morocco which was concluded in 1787. The two treaties were substantially identical in terms and Articles 20 and 21 are the same in both. Accordingly in construing the provisions of Article 20—and, in particular, the expression "shall have any dispute with each other"—it is necessary to take into account the meaning of the word "dispute" at the times when the two treaties were concluded. For this purpose it is possible to look at the way in which the word . . . was used in the different treaties concluded by Morocco: e.g. with France in 1631 and 1682; with Great Britain in 1721, 1750, 1751, 1760 and 1801. It is clear that in these instances the word was used to cover both civil and criminal disputes.
>
> It is also necessary to take into account that, at the times of these two treaties, the clear-cut distinction between civil and criminal matters had not yet been developed in Morocco.
>
> Accordingly, it is necessary to construe the word "dispute", as used in Article 20, as referring both to civil disputes and to criminal disputes . . .'

In the *Minquiers* case, Judge Levi Carneiro, in his separate but concurring opinion, stated the negative form of the principle as follows (*I.C.J.*, 1953, p. 91):

> 'I do not regard the Treaty of Paris as a treaty of frontiers. To do so would be to fall into the very error which we have been warned against[1]: an instrument must not be appraised in the light of concepts that are not contemporaneous with it.'

This principle is in a sense a special application of the principle of the natural and ordinary meaning *in the context in which the terms occur*, since this would involve relating the matter to the date when the treaty was concluded is clearly of the first importance, given the age and long duration of many treaties, and the fact that they frequently make use of terms which have since become archaic, or have acquired a different meaning or usage. Not to take account of contemporary practice and circumstances, and to interpret such treaties according to modern concepts, would often amount to importing into them provisions they never really contained, and imposing on the parties obligations they never actually assumed. That this danger is by no means imaginary was shown by the *Ambatielos* case, in which the claimant State's main contention was based on importing into a modern commercial treaty, through its most favoured nation clauses, the provisions of a number of older treaties, some dated nearly 300 years earlier. It was argued that the (frequently archaic) terms of these treaties should be construed very much as if they had actually figured in the modern treaty and were the analogous terms of such a treaty. As the Court, in both phases of the case, only dealt with jurisdictional issues, it did not pronounce on the merits of this argument, but it was in effect rejected by the eventual Anglo-Greek Commission of Arbitration[1] which sat in London from January to March, 1956, and dealt with the substantive issues. The Commission, speaking of these old Treaties, said (*Award*, p. 17:)[2]

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[1] Counsel for the United Kingdom had suggested (*inter alia*) that in the context of feudal thought and conditions, modern concepts of sovereignty, international frontiers, &c., were in many ways alien or beside the point.

> 'Naturally their wording was influenced by the customs of the period, and they must obviously be interpreted in the light of this fact.'

§ 2. ANCILLARY AND OTHER[3] INTERPRETATIVE FINDINGS DURING THE 1951–4 PERIOD

(1) LEGAL CHARACTER AND EFFECT OF THE PREAMBLE TO A TREATY

(*a*) *Interpretational character and effect.* In the 1951 article (pp. 24–25), it was pointed out that while the preamble to a treaty did not normally, and strictly ought not, to contain substantive provisions, it was or could be something more than a mere recital of facts and motives, and could legitimately have interpretational character and effect, in two ways: '(i) in order to elucidate the meaning of clauses the purpose of which might otherwise be doubtful; (ii) to indicate the juridical "climate" in which the operative clauses should be read, whether for instance liberally or restrictively, broadly or strictly.' A pronouncement of the Court in the *Asylum* case (*I.C.J.*, 1950, p. 282) was cited, in which the Court had made use of a preamble to a convention[4] in order to support and justify a restrictive interpretation of the latter. In the 1951–4 period also, the Court, in the *Morocco* case, made use for interpretational purposes of a preamble to a treaty, in connexion with the Madrid Convention of 1880, saying (*I.C.J.*, 1952, p. 196) in a passage already referred to above on another question:[5]

> 'The purposes and objects of this Convention were stated in its Preamble in the following words: "the necessity of establishing, on fixed and uniform bases, the exercise of the right of protection in Morocco and of settling certain questions connected therewith . . ." In these circumstances, the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects.'

Again, on p. 198, speaking of the Act of Algeciras, the Court, after observing that an 'interpretation, by implication from the provisions of the Act, establishing or confirming consular jurisdiction would involve a transformation of the then existing treaty rights of most of the twelve Powers into new and autonomous rights based upon the Act', went on to say that neither

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[1] Consisting of Dr. Ricardo J. Alfaro (Panama) as President, Dr. Algot Bagge (Sweden), and M. Maurice Bourquin (Belgium), M. Jean Spiropoulos (Greece), and Gerald Thesiger esq., Q.C. (United Kingdom).

[2] Published by H.M. Stationery Office, 4602 of March 6th, 1956 (S.O. Code No. 59–126).

[3] The phrase 'subsidiary interpretative findings', used in the 1951 article, does not seem quite apt to describe pronouncements a number of which are of considerable significance for treaty interpretation.

[4] This was the Havana Convention of 1928, on Diplomatic Asylum.

[5] See above, § 1, subsection (4), under 'Major Principle I'.

'the preparatory work nor the Preamble gives the least indication of any such intention'.[1] In the *Asylum* case the Court had used a preamble for purpose (ii) noted above. The *Morocco* case was one where it used a preamble for purpose (i). Although the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, any express or explicit general statement of the treaty's objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty. This is well illustrated by the above quoted passage from the judgment in the *Morocco* case, showing that an implication which might perhaps otherwise have been read into the Madrid Convention, on the basis of the circumstances in which it was concluded, was regarded as specifically ruled out, because it would conflict with the express statement of the purposes of the Convention contained in its preamble. The issue was whether the Convention brought about and effected by implication a confirmation (that is to say a perpetuation on an independent basis) of a consular jurisdiction already existing on another basis. The Court considered that the Convention 'presupposed the existence of such jurisdiction' and regulated certain matters connected therewith, but that it went no further than that. It is of some importance that the Court, in coming to this conclusion, did not (loc. cit.) consider that any operative provision of the Convention gave ground for a different view:

> '. . . it is equally clear that there were no provisions of the Convention which expressly brought about a confirmation of the then existing system of consular jurisdiction, or its establishment as an independent and autonomous right.'

It was following on this that the Court referred to the declared objects and purposes of the Convention as stated in the preamble. The same point emerges from another passage, in which the Court, after the reference to the preamble of the Act of Algeciras noted above, went on (p. 198) to make an *exception* in favour of certain articles

> 'which include provisions necessarily involving the exercise of consular jurisdiction . . . and to this extent it is possible to interpret the provisions of the Act as establishing or confirming the exercise of consular jurisdiction for these limited purposes. The maintenance of consular jurisdiction in so far as it may be necessary to give affect to these specific provisions can, therefore, be justified as based upon the necessary intendment . . . of the Act.'[2]

The conclusion seems to be that, if an *operative* provision clearly confers or establishes a right, the attitude of the Court will be similar to that evinced recently in England by the Court of Appeal and the House of Lords in the case of *H.R.H. Prince Ernest Augustus of Hanover* v. *The Attorney General*[3] as regards the interpretation of the so-called Act of Anne (1705), namely, that the scope of *clear* terms in an operative clause conferring a right, or creating a status, cannot be cut down by more restrictive language employed in a preamble. It would, of course, be different if the wording of the operative clause was obscure or ambiguous, when the language of the preamble would serve to elucidate the matter.

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[1] Here, incidentally, the Court seems almost to have placed the preamble on a level with mere 'extremeous' matter—a fact which reinforces the conclusion reached below at the end of sub-section (*a*).

[2] A further affirmation of the same point occurs on p. 199 of the *Report.*

[3] [1955] 3 A.E.R. 647; [1957] 1 A.E.R. 49.

(*b*) *Binding character of a preamble.* It seems clear that, subject to the above remarks, the preamble to a treaty is not only an integral part of the treaty, but is also, within the limits of its proper functions—particularly its interpretational functions—as binding in character as any other part of the treaty: it merely does not contain, or does not usually (and should not, in point of form) contain, directly operative provisions. Thus, recitals of fact, or descriptions of antecedent events, contained in a preamble, would certainly be *prima facie* evidence of the existence of these facts, or the occurrence of the events concerned, and would normally be conclusive in regard to them, in the absence of direct evidence of error. Similarly, recitals or statements of the motives of the parties, or of any of them, in entering into the treaty, would, in general, be conclusive as to those motives, particularly as against any party specifically concerned; and would normally be conclusive (unless contradicted elsewhere, in the operative part of the text) as to the intentions generally of the parties in entering into the treaty. A preamble may therefore provide an ideal, and eminently satisfactory meeting ground for the textual and 'intentions' methods of approach. In the same way, and for the same reasons, the interpretational conclusions to be drawn from a preamble are as binding on the parties as those to be drawn from any other part of the treaty. In none of these respects can the validity of a finding or conclusion be denied *merely* because it is drawn from, or based on language contained in a preamble, and not in an operative clause, though if there is conflict, the latter will prevail—(see under (*a*) above). The binding character, within these limits, of the terms of a preamble was in effect affirmed by the Court in the *Morocco* case (*I.C.J.*, 1952, p. 184) when, speaking of 'the principle of economic liberty without any inequality . . . inserted in the Preamble of the Act [of Algeciras]', it said that

> '. . . it seems clear that the principle was intended to be of a binding character and not merely an empty phrase.'

(2) THE INTERPRETATION OF A UNILATERAL DECLARATION

'Declarations' may be of three kinds: (i) Bilateral or multilateral Declarations, which are unilateral neither in substance nor in form; (ii) unilateral Declarations, that are unilateral both in form and in substance; and (iii) unilateral Declarations that are unilateral in form but not in substance.

In case (*i*) the term 'Declaration' is merely one of the several appellations that can be, and on occasion are used to describe what are essentially treaty instruments, or other forms of ordinary international agreements.[1] Their interpretation will be governed by the normal rules of treaty interpretation, and raises no special problem. The Court had occasion to interpret Declarations of this kind both in the *Morocco* case and in the *Ambatielos* case (particularly in the second phase), and did so in accordance with the usual rules of treaty interpretation.

In case (*ii*) the Declaration is unilateral not only in form but as to substance, in the sense that it is not made in return for, or simultaneously with, any specific *quid pro quo* or as part of any general understanding. Such a Declaration may or may not create binding legal obligations for the declaring party, according to its wording and intent, and the circumstances of its making; but it seems fairly well settled that it can and will do so if clearly intended to have that effect, and held out, so to speak, as an instrument on which others may rely and under which the declarant purports to assume such obligations. Particularly will this be so where other countries have, on the faith of the Declaration, changed their position or taken action on the basis of it. It seems clear that once a Declaration of this kind is established as containing binding obligations, its terms will, *mutatis mutandis*, fall to be interpreted much as if they figured in an actual treaty text. A more subtle point arises over the question of determining *whether* the instrument concerned does or does not create or give rise to binding legal obligations—for this is partly a question of interpretation (of the text itself) and partly a question of substance that may depend on considerations extraneous to the actual text,[2] and on this aspect of the matter a tribunal may therefore reasonably adopt an approach based on such extraneous considerations. This is so, as will be seen, even as regards case (iii) below, and must apply *a fortiori* in respect of case (ii), in which the element of contract is lacking.

In case (*iii*), on the other hand, the contractual element is present. The Declaration is unilateral in form, but is contractual in substance, either because it is one of two or more similar Declarations intended to be interdependent or interlocking,[3] or because it is linked to the action of another State, which either forms the *quid pro quo* for it, or in respect of which it is itself the *quid pro quo*. Such a situation gives rise to a 'treaty position' in which the text or texts concerned will clearly fall to be interpreted according to the normal rules of treaty interpretation. An excellent example of such a situation is afforded by the various Declarations under the so-called Optional Clause (Article 36 (2) of the Statute of the Court), accepting in principle (though in varying terms and subject to varying qualifications and reservations) the compulsory jurisdiction of the Court. It was the interpretation of Declarations of this type (particularly that of Iran) that the Court dealt with in the *Iranian Oil* case. The interlocking, and hence basically contractual nature of these Declarations arises directly from the condition of reciprocity attached to nearly all of them,[1] the general effect of which is to limit the obligation of the defendant State to go before the Court under its Declaration to cases in which, were it plaintiff, it could itself take the other party to the Court under the corresponding Declaration made by that party. In the *Iranian Oil* case, the Court, after referring to the 'conditions of reciprocity' attaching to the Iranian and United Kingdom Declarations respectively, went on to state the position as follows (*I.C.J.*, 1952, p. 103):

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[1] For an interesting recent discussion of this see Mr. Denys P. Myers, 'The Names and Scope of Treaties', in the *American Journal of International Law*, 51 (1957), No. 3, p. 574, in which some thirty-eight different appellations are considered.

[2] It seems obvious that the events or circumstances which have led to the making of the Declaration will be a factor of primary importance in judging its character.

[3] Yet unilateral declarations can be connected in substance without being *formally* connected, or giving rise to binding obligations—for instance two countries make parallel declarations of intention in regard to a certain matter, which each will *in fact* keep to so long as the other does, but could, without any illegality, depart from or withdraw at any time, at the risk of a corresponding departure or withdrawal by the other.

> 'By these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself. This is common ground between the parties.'

In these circumstances it was inevitable that the Court should, automatically and without any discussion of the matter, apply ordinary canons of treaty interpretation to the elucidation of the Iranian Declaration; for if, in the given case, this Declaration fell to be interpreted standing alone and as it were unilaterally, this was a position that had itself only been arrived at after considering and interpreting the two Declarations together, as part of a common contractual situation, and which did not affect the essentially contractual character of the Declaration to be interpreted.[2] Nevertheless, the Court seems to have felt that, from certain points of view, the unilateral character of the Declaration in point of *form*, and more particularly the manner of its drafting, might render certain principles of interpretation, applicable in the case of a treaty proper, inappropriate to such a Declaration. It was thus that the Court refused to apply to this Declaration the principle (of which, as has been seen above (see § 1, subsection (4) under 'Major Principle IV'), it approved in the case of treaties proper) that the text must be interpreted, if at all possible, so as to give meaning and effect to every word, and not render certain words superfluous. The Court said (*I.C.J.*, 1952, p. 105):

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[1] Only some two or three appear to be quite unconditional.

[2] In essence, the two Declarations (as with any two Declarations accepting the Court's compulsory jurisdiction) together constituted an agreement, the point at issue, and the effect of the agreement in the given case, turning on the interpretation of a particular provision—in this case certain words in the Declaration of Iran.

> 'But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous. This caution is explained by the special reasons which led the Government of Iran to draft the Declaration in a very restrictive manner.'

The Court then went on to consider and apply extraneous elements of interpretations, based on the circumstances antecedent to the making of the Declaration.[1] It is clear, however, that in the above quoted passage the essential words are not that the Iranian Declaration was not 'a *treaty* text', but that it was not 'a . . . text resulting from *negotiations* between two or more States', and was 'the result of unilateral drafting' by one Government. The conclusion seems to be that, in the Court's view (and this would apply equally and *a fortiori* to case (ii) above), extraneous elements constitute a more important element, and can more legitimately be resorted to, in the interpretation of unilateral, or rather unilaterally formulated, instruments, than in the case of bilaterally or multilaterally formulated ones, in respect of which the textual element will predominate.[2]

(3) NEED TO EXERCISE CAUTION IN READING SUBSTANTIVE PROVISIONS INTO A TREATY BY A PROCESS OF IMPLICATION—THE ASSUMPTION OF THE PRE-EXISTENCE OF A RIGHT IN A TREATY DOES NOT *PER SE* CONSTITUTE A RE-ENACTMENT OR RE-ESTABLISHMENT OF IT ON AN INDEPENDENT BASIS

This matter has already been the subject of some discussion (subsection (1) above, and also § 1, subsection (4)) in connexion with the themes that the Court will not 'interpret' a treaty in such a way as to cause it to undergo 'radical changes and additions', and that the terms of the preamble to a treaty, if clear and definite as to its objects and purposes, will have the effect of excluding an interpretation that might otherwise have been read into the treaty by implication. It was also fully discussed from another point of view in the article in this *Year Book*, 30 (1953), pp. 58 et seq., especially pp. 62–64 where most of the relevant passages are quoted in full. The questions involved, and the general question of the treatment of implications, arose in the *Morocco* case with regard to two multilateral Conventions—the Madrid Convention of 1880 and the Act of Algeciras of 1906. The issue, which has already been sufficiently described (loc. cit., above), was whether an implication could be read into these Conventions of the existence (as having an independent basis in them) of a right for the parties to exercise consular jurisdiction in Morocco; and further, whether this implication could be derived from the mere fact that the Conventions referred to the exercise of such jurisdiction, and in some respects regulated its exercise. It has been seen that, in general, and even apart from the fact that the Court regarded such an interpretation as actually negatived by the preambles to the Conventions, its findings were clearly unfavourable to such a process of interpretation, which was rejected (except as regards certain specific articles, to which effect could not be given without the maintenance of the measure of consular jurisdiction which giving effect to them would necessitate).[1] In short, the implication, to be validly drawn, must be a necessary one. Apart from these articles, the Court did not think it was so: the Conventions might presuppose and assume the existence of consular jurisdiction at that time, but they did not thereby, so to speak, re-enact it, or re-establish it on an independent basis. The Court was no doubt influenced in taking this view in the *Morocco* case, by the drastic changes in treaty relationships in respect of Morocco which it considered would have resulted from the process.[2] But the point of principle involved is a fairly common one, which is of some importance and may have many different applications.[3] Treaties not infrequently assume or base themselves on the pre-existence of some fact or right. It does not follow that they thereby incorporate it as a substantive element, in such a way as to entail its perpetuation or continued duration. There is no *a priori* necessity for any result other than that, if the fact does actually persist, or the right remain in existence, the treaty will continue to have relevance and applicability—and if not, not: that is to say, it (or the particular clauses concerned) will to that extent become obsolete or cease to have any useful sphere of operation. Whether this is the case or not must depend on the language used; but the line taken by the Court in the *Morocco* case seems to indicate that the presumption will be against reading 're-enactments' or 'perpetuations' of existing rights or circumstances into a treaty by any process of implication other than a necessary one, such that the terms of the treaty as a whole can scarcely be given effect to otherwise.[1] It was not only in regard to the question of the right to exercise consular jurisdiction that the Court took up this attitude in the *Morocco* case. As was described in an earlier article (this *Year Book*, 30 (1953), pp. 58–62), the Court rejected an analogous argument as to the possible effect of most-favoured-nation clauses in perpetuating existing rights, so as to continue them even if their previous basis had determined. A similar line was taken on the question whether the Madrid and Algeciras Conventions 'confirmed and incorporated' 'the then existing principle of tax immunity' for foreigners in Morocco. The Court thought (*I.C.J.*, 1952, p. 206) that the Madrid Convention:

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[1] The principal factor here was the recent denunciation by Iran of all treaties with other States concerning the capitulatory régime, and the consequent probability that, in accepting the Court's compulsory jurisdiction, it would have been the intention to accept it only in respect of disputes about treaties concluded after that date, and so as to exclude disputes about the treaties recently denounced.

[2] Judge Read, on the other hand, while perhaps imputing to the Court more extreme views than it actually entertained in regard to the effect of the unilateral form of the Declaration, did not consider that this factor justified any special treatment, and stressed the consensual element involved (ibid., p. 142): 'I am unable to accept the contention that the principles of international law which govern the interpretation of treaties cannot be applied to the . . . Declaration because it is unilateral. Admittedly it was drafted unilaterally. On the other hand, it was related, in express terms, to Article 36 of the Statute, and to the declarations of other States which had already deposited, or which might in the future deposit, reciprocal declarations. It was intended to establish legal relationships with such States, consensual in their character, within the régime established by the provisions of Article 36.'

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[1] See above, subsection (1) (*a*).

[2] See the passage quoted above in subsection (1) (*a*), which, in the original, also contained the following words: 'It would change treaty rights of the Powers, some of them terminable at short notice . . . into rights enjoyable for an unlimited period . . . and incapable of being terminated or modified by Morocco.'

[3] A recent example is afforded by the contention that the nationalization of the Suez Canal Company in 1956 was contrary to, or at any rate inconsistent with, the Suez Canal Convention of 1888 on freedom of passage through the Canal, because of the recital in the Preamble that the régime of the Convention (on passage rights) was intended to 'complete' the administration and management régime created by the various concessions granted to, and agreements made with, the Suez Canal Company, and that the Convention was therefore based on the assumption of the continuance of that régime for at least its full initial period until 1968. It is certainly a legitimate view that a régime instituted expressly to complete an existing régime in effect re-enacts or guarantees as part of the treaty the continuance of that régime.

> '. . . merely presupposed the existence of this principle and curtailed it by exceptions in Articles 12 and 13 without modifying its legal basis. It did not provide a new and independent ground for any claim of tax immunity.'

Equally (ibid.) the Act of Algeciras

> '. . . which further curtailed the régime of tax immunity . . . did not provide any new and independent legal basis for exemption from taxes.'

Although the four-judge minority in the *Morocco* case expressly dissented from the Court on this point,[2] it would be difficult to disagree that a treaty which *cuts down* a right cannot be said thereby to confirm and perpetuate or re-enact it except as cut down. All it does is to leave it in other respects, and *pro tempore*, unaffected.

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[1] Even so it may be a nice question, which, however, can only be answered in the light of the situation as a whole, whether the treaty is not itself dependent on the continued existence of the extraneous rights or circumstances concerned, rather than that these have now become based on the treaty.

[2] Judges Hackworth, Badawi, Carneiro and Rau thought (ibid., p. 224) that since 'At the time of the Convention of Madrid and the Act of Algeciras, foreign nationals enjoyed a general immunity from taxes', therefore 'the taxes enumerated in these treaties were exceptions to a prevailing general rule and they must now be read as if the general rule were embodied in the treaties'. It seems clear that the attitude of the dissenting Judges on this point was influenced by the view they took of the general character and effect of such an instrument as the Act of Algeciras, as 'a great multilateral convention directly binding upon Morocco and the United States as well as the other signatory Powers'—see the passages quoted in n. 1 on p. 64 of the article in this *Year Book*, 30 (1953).

(4) LOCAL TRADITION AS AN EXTRANEOUS MEANS OF INTERPRETATION

Practical, but, it would seem, no formal limits exist as to the means of interpretation, extraneous to the text, to which recourse may legitimately be made,[1] assuming the case is one that justifies recourse to extraneous means at all (as to which see above, p. 215, point (c)). Amongst the more obvious of such means, of which mention has been made as having on different occasions been resorted to by the Court, are *travaux préparatoires*, other parallel treaties, antecedent or contemporaneous circumstances, on historical data, and subsequent conduct or practice in relation to the Treaty. In the *Asylum* (*Haya de la Torre*) case (consequential points phase), the Court made use of a further method, namely, the existence of a local tradition, in the light of which the Treaty could be assumed to have been concluded—or at any rate contrary to which it could be assumed that it was not intended to go. The Court having found in the previous and main phase of the *Asylum* case (see the article in this *Year Book*, 27 (1950), pp. 31 et seq.) that the grant of political asylum in a foreign embassy to a local national charged with certain offences under local law was illegal, the question then arose whether this decision entailed for the State whose embassy it was an obligation to bring about an actual *surrender* of the *de cujus* to the local authorities. As was described in the article in this *Year Book*, 32 (1955–6), pp. 77–78, the Court dealt with this point in the consequential points phase of the case, and found that while there was an obligation to terminate the asylum by one means or another, there was no obligation to do so by the particular method of actually delivering the *de cujus* to the local authorities. In arriving at this conclusion, the Court had occasion to consider the effect of the Havana Convention on *Asylum* of 1928, the first article of which required that 'persons accused of or condemned for common crimes shall be surrendered to the territorial authorities', but which did not contain any similar provision in respect of political offenders (in which category the *de cujus* figured). The Court went on (*I.C.J.*, 1951, p. 81):

> 'This silence cannot be interpreted as imposing an obligation to surrender the refugee in case the asylum was granted to him contrary to the provisions of Article 2 of the Convention [as the Court had found]. Such an interpretation would be repugnant to the spirit which animated the Convention in conformity with the Latin-American tradition in regard to asylum, a tradition in accordance with which refugees should not be surrendered. There is nothing in that tradition to indicate that an exception should be made where asylum has been irregularly granted. If it had been intended to abandon that tradition, an express provision to that effect would have been needed, and the Havana Convention contains no such provision. The silence of the Convention implies

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[1] The Resolution of the Institute of International Law the text of which is given in n. 3, p. 210, above, uses the phrase 'Amongst the legitimate means of interpretation [sc. apart from the strictly textual] are the following: . . .' (*Annuaire*, vol. 46 (1956), p. 365).

that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency. To infer from this silence that there is an obligation to surrender a person to whom asylum has been irregularly granted would be to disregard both the role of these extra-legal factors in the development of asylum in Latin-America, and the spirit of the Havana Convention itself.'

(The Court could, of course, have arrived at the same conclusion purely on the basis of the text, and of the principle *expressio unius est exclusio alterius*. The Convention provided for the surrender of persons accused of common crimes, and could equally have provided for the surrender of political offenders irregularly granted asylum. It did not do so: *ergo* it involved no obligation to surrender such offenders. However, there is perhaps some warrant for going outside the text when the question is not so much one of assigning a meaning to the actual terms used, as of interpreting or deducing the meaning of a silence.[1])

(5) *GENERALIA SPECIALBUS NON DEROGANT*—ASPECT OF THIS PRINCIPLE INVOLVED IN THE MAXIM 'THE SPECIFIC PREVAILS OVER THE GENERAL'

The '*generalia*' principle can have a number of applications. It does not merely involve that general provisions do not *derogate* from specific ones, but also, or perhaps as an alternative method of statement, that a matter governed by a specific provision, dealing with it as such, is thereby taken out of the scope of a general provision dealing with the *category* of subject to which that matter belongs, and which therefore might otherwise govern it as part of that category. It was in the application of this principle (*inter alia*) that Judge Hsu Mo dissented from the decision of the majority in the first phase of the *Ambatielos* case. The issue was whether a Declaration signed simultaneously with the Anglo-Greek Commercial Treaty of 1926 (superseding a former Treaty of 1886), which Declaration provided for the arbitration before an arbitral Commission of any dispute that might arise in respect of 'claims on behalf of private persons based on the provisions of the . . . Treaty of 1886—formed "part" of the later Treaty of 1926', in such a way that Article 29 of that Treaty, which provided in effect (see p. 221, n. 2 above) for a reference of any disputes about its interpretation or application to the Court, applied also to any disputes about the interpretation or application of the Declaration itself. While considering, on other grounds, that the Declaration did not form part of the 1926 Treaty, Judge Hsu Mo also considered that, even if it did, the *generalia* rule would have prevented it from falling under the régime of Article 29.[1] He said (*I.C.J.*, 1952, pp. 87–88):

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[1] Yet there is a logical difficulty in doing so here. There is no need to 'interpret' the meaning of a silence unless the silence is one that calls for explanation, i.e. amounts to an omission of something that would normally be dealt with in the text. There was no necessary reason why the Havana Convention, having provided for the surrender of persons accused of common crimes, it should have gone on to state expressly that political offenders need not be surrendered; and it is possible to discern at least some reasons why it should not have done so.

> 'Even assuming that the Declaration does form part of the Treaty of 1926, the clause of arbitration in the Declaration must be regarded as a specific provision, since it deals with a specific kind of dispute, whereas the arbitration clause in Article 29 must be regarded as a general provision, since it covers disputes relating to all the provisions of the Treaty. It is a well recognized principle of interpretation that a specific provision prevails over a general provision. Therefore even if the Declaration had actually been written into the Treaty as an additional article, it must nevertheless . . . form an exception to the applicability of Article 29.
>
> It is thus clear that the Court . . . cannot exercise jurisdiction conferred upon it by Article 29 of the Treaty of 1926, in a dispute relative to the interpretation or application of the Declaration. . . .'

While the foregoing passage is of interest and value as a statement of the 'well recognized principle of interpretation that a specific provision prevails over a general provision', it is permissible to doubt whether this principle was given a correct application in the circumstances. The *generalia* rule can only apply where both the specific and general provision concerned deal with the same substantive matter. Here it is true that, as Judge Hsu Mo said, Article 29 and the Declaration both contained provisions about arbitration or adjudication—but these provisions did not relate to the same order of disputes. The essential point was that the Declaration did not contain any provision for the settlement of a dispute about *its own* interpretation or application: it only provided for the method of settling another class of disputes arising under a different instrument. Had the Declaration, being found (as it was by the Court) to be part of the 1926 Treaty, contained a separate, special provision for the settlement of disputes about itself, then Judge Hsu Mo's view that it was outside the scope of Article 29 (which provided generally for a reference to the Court of disputes arising under the 1926 Treaty) would certainly have been correct—for in those circumstances the Declaration would have constituted a provision providing specially for the settlement of disputes concerning a particular part of the 1926 Treaty (i.e. the Declaration itself, found to be a part of that Treaty). But the Declaration, while providing that disputes arising under the 1886 Treaty should go to arbitration, made no provision at all for the settlement of any dispute concerning its own interpretation or application. There was consequently no possibility of conflict between the Declaration and Article 29; and once it was found that the Declaration was part of the Treaty (which was the principal issue in this phase of the case) there was no reason why disputes about it should not fall within the ambit of Article 29. The fact that there would otherwise have been a gap in the provisions for the settlement of disputes (because there would have been no provision for settling any disputes about the Declaration itself) was indeed one of the factors influencing the finding that the Declaration was part of the treaty.[1]

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[1] A similar view was taken by Lord McNair at pp. 64 and 65. On the latter page he said: 'But even if the provisions of the Declaration are among the provisions of the Treaty of 1926, in my opinion the existence of the special machinery for dealing with disputes contained in the Declaration excludes the application of the general provisions of Article 29 of Treaty.'

(6) GRANTS TO BE INTERPRETED RESTRICTIVELY IN FAVOUR OF THE GRANTOR

The general principle that there can be no presumption in favour of an intention to grant more rather than less, and that in cases of doubt, or in the absence of contrary indications, the presumption must be in favour of the least that is consistent with the language used, was referred to in the separate but concurring opinion of Judge Basdevant in the *Minquiers* case. In dealing with the question whether claims in certain Anglo-French medieval treaties of peace, transferring or recognizing title to territory, were to be regarded (presumptively, and through the use of general terms) as covering certain islands not specifically named, he said (*I.C.J.*, 1953, p. 77):

> 'From the fact that he Ecrehos and the Minquiers are not expressly mentioned here, and from the fact that in other instruments they do not appear in one or other of the enumerations of islands . . . no conclusion can be drawn as to the sovereignty over the islets . . .
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> If it were a question of interpreting the Treaty of 1259, it would be necessary to have regard to the fact that the King of France by this Treaty "gives" the islands, on condition of liege homage, to the King of England who, until then . . . enjoyed no rights there . . . In case of doubt, therefore, this Treaty should be interpreted in favour of the grantor, in the sense of restricting the gift.'

DIVISION B: SUBSTANTIVE POINTS OF TREATY LAW

§ 1. MISCELLANEOUS POINTS

(1) NECESSITY FOR PRIVITY OF CONTRACT—STATUS OF CONCESSIONARY AGREEMENTS—CHARACTER OF A TREATY

(*a*) *The question of privity of contract.* In the *Iranian Oil* case, the United Kingdom attempted to prove the existence of a treaty or international agreement by indirection, so to speak. The contention was not so much that such an agreement could arise without privity of contract,[2] as that privity itself could arise indirectly. In 1932 Iran had cancelled the so-called

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[1] See above, § 1, subsection (4), under 'Major Principle IV'.

[2] The point is in any case one that arises mainly with reference to bilateral instruments, and plurilateral instruments with restricted participation. In the case of general multilateral treaties or conventions—although, as the jointly dissenting Judges in the *Reservations* case pointed out (see below, subsection (2) (*b*)), the contractual element in their character cannot be ignored there is a certain unreality in the notion of privity of contract, particularly in the case of accessions effected subsequent to the coming into force of the treaty by countries which never participated in its original negotiation. This is more like joining the club, and thereby being automatically bound by the rules.

D'Arcy Concession given in favour of a British oil company, and the matter was thereupon brought before the Council of the League of Nations by the United Kingdom. In the 1952 proceedings before the International Court, the United Kingdom contended that the previous (1932–3) dispute had been settled—and that the proceedings before the League Council had been discontinued—on the basis of a new Concession granted to the same Company, providing *inter alia* (i) for its continuance for a fixed term of years; (ii) that it should not in the meantime be cancelled; and (iii) that any dispute between the Iranian Government and the Company concerning it should be referred to arbitration. This was the Concession which the Iranian Government proceeded in effect to cancel in 1957,[1] and it was contended by the United Kingdom that this Concession had a double character. In the direct sense, it constituted an agreement between the Iranian Government and the Company. Its terms, however, also constituted the basis on which the dispute before the League Council was settled. Indirectly therefore, these terms involved an agreement between Iran and the United Kingdom. The Iranian Government was not only bound *vis-à-vis* the Company to observe them, but was also bound *vis-à-vis* the United Kingdom Government to observe them *in respect* of the Company. A breach or cancellation of the Concession by Iran therefore automatically entailed a breach of an agreement with the United Kingdom: and since this agreement constituted (in this, its second aspect) an international agreement, there was in effect a breach of treaty by Iran.[2] An analysis of this argument shows that it did not so much allege that one and the same agreement (the Concession) was simultaneously both a private contract and an international treaty, as that there were in effect *two agreements*, one a private contract between the Iranian Government and the Company, the other a tacit agreement between Iran and the United Kingdom, the terms of which were that, in consideration of the discontinuance of the proceeding before the League Council, the first agreement would be observed. Therefore, although by a process which was indirect, the United Kingdom nevertheless acquired a direct right to insist on the observance of the concessionary terms; and a breach or cancellation of these would, in effect, involve a breach of an agreement with the United Kingdom. This contention obviously raised two questions: (i) was it good in principle—i.e. assuming it could be established on the facts that there was what amounted to a promise by Iran to the United Kingdom to observe the concessionary terms, if the League proceedings were discontinued; and (ii) could the latter proposition be established on the facts?

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[1] The 'cancellation' was not so much direct and overt, as an inevitable consequence of the two Iranian laws of 1951, nationalizing the oil industry; but the veil was a thin one, seeing that the Anglo-Iranian Oil Company was the only entity, domestic or foreign, which was then engaged in oil operations in Iran.

[2] Iran's Optional Clause Declaration only covered 'disputes . . . with regard to situations or facts relating . . . to treaties or conventions accepted by Persia . . . subsequent to the ratification of this declaration. . . .' (In this quotation the 'and' before 'subsequent' has been omitted in order to give effect to the Court's finding that the phrase 'and subsequent to the ratification of this declaration qualified 'treaties or conventions accepted by Persia' and not 'situations or facts'.)

(i) *The point of principle.* The Court, which seems to have regarded the United Kingdom contention as involving the proposition that there was one agreement having a double character,[1] rejected the principle of the argument as follows (*I.C.J.*, 1952, p. 112):

> 'The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signatures of the representatives of the Iran Government and the Company has a single purpose: the purpose of regulating the relations between that Government and the Company in relation to the concession. It does not regulate in any way the relations between the two Governments.'

It would, however, seem that this passage, while affirming correctly (subject to the point made in n. 2, p. 238, above) that there must be privity of contract before an agreement between two parties can arise, and while also correctly denying that a concessionary agreement between a government and a private party or entity could—at any rate in the absence of special circumstances[2]—constitute in itself, and as such, an international agreement between governments, did not deal with the real issue of principle involved, which was not so much whether the Concession *per se* constituted an international agreement (clearly it did not—see under subsection (*b*) below), but whether it was not possible for the same set of terms to be common[3] to two separate and parallel agreements, the one private and the other inter-governmental. It was admittedly not necessary for the Court to determine this point, because (see above, subparagraph (ii)) it did not in any event consider the contention warranted on the *facts* of the *Anglo-Iranian* case.[4] It is submitted, however, that where the facts do support the contention, there is in principle nothing to prevent a position arising in which one government may be bound towards another government on the international plane to observe the terms of a contract or agreement entered into by it with a private person or entity, in particular a national, or national company, of the latter government.[1] There can, for instance, be no doubt that a direct promise or undertaking given by one government to another to observe or carry out the terms of such a contract would constitute an international obligation, the detailed terms of which would be those of the contract. But the situation is less clear when it is attempted to establish such a position, not on the basis of a direct promise or undertaking, but of an implication, so that the alleged international agreement would rest on a tacit undertaking to behave in a certain way. It was on this point that the United Kingdom contention (otherwise valid in principle) really broke down.

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[1] There was perhaps some justification for this in the way the United Kingdom point was put, which, according to the Court (*Report*, pp. 111–12), was that the *Concession* had 'a double character . . . of being at once a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments'. As an *instrument* it obviously could not have had this character; but there might well have been two separate *agreements*.

[2] As almost certainly, for instance, in the case of the Suez Canal Company's Concessions.

[3] The existence of terms common to two agreements would not mean that the two agreements were identical—each might have other terms.

[4] The Court probably did not deal with the point precisely because it did not consider that there was any tacit inter-governmental agreement at all.

(ii) *The question of fact.* As has been seen in connexion with the *Morocco* case (above, Division A, § 2, subsection (3)), the Court has shown itself reluctant to read positive obligations into treaties by a process of implication, particularly where this would involve a sort of re-enactment on a different plane of an agreement already existing on another footing. A somewhat similar process was involved by the United Kingdom contention in the *Iranian Oil* case, now under consideration. To overcome this reluctance, the United Kingdom would have had to show that the Iranian Government had, or could fairly be regarded as having in the circumstances, involved itself in a definite undertaking towards the United Kingdom Government to observe the terms of the Concession in respect of the Company. The circumstances in which it was suggested that such an undertaking could and should be inferred were as follows.

The facts involved. The Rapporteur whom the League Council, in accordance with its usual procedure, had appointed, reported, after consultations with the parties, that both had agreed to suspend further proceedings, on the basis that the Iranian Government would enter into negotiations with the Company, and that if the negotiations should fail the matter would be brought back to the Council. The negotiations did not fail, but resulted (in 1933) in the signature of the concessionary agreement, followed by its ratification on the part of Iran. All this being completed, the Rapporteur then submitted his final report to the Council, to which he annexed the text of the new Concession, and in which he stated that 'the dispute between [the two Governments] is now finally settled'. At the Council meeting at which this report was considered, the Iranian and

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[1] It can even be said (see the *Suez Canal Company* case) that such an obligation may exist in respect of an agreement between a government and an entity technically of its own nationality, if the agreement has been or becomes embodied in, or the basis of, an international agreement proper.

United Kingdom representatives each expressed their satisfaction at the settlement thus reached, and the matter was thereupon removed from the Council's agenda.

The issues involved by the facts. There were two issues involved, on two different aspects of the same issue. The first posed the question whether the inter-governmental *dispute* had been actually *settled* on the basis of certain agreed and definite *terms*, or whether the *complaint* had merely been *withdrawn* in the light of a new *fact*, namely the grant of a new Concession by Iran. The terms of the Rapporteur's report, and the statements of the Iranian and United Kingdom representatives on the Council, lend some colour to the former view; but it could also be maintained that the original complaint having been evoked by the cancellation of a Concession, it was automatically determined and satisfied—*irrespective of any agreement on the international plane* (*and in particular by the United Kingdom*)—so soon as a new Concession was granted on terms satisfactory to the Company, and agreed by them. This second view was in effect that taken by the Court. An alternative method of posing the issue would have been to ask what was the character of the promise, if any, made by Iran to the United Kingdom and at what point and in what way was this promise made; or, to expand that a little, if an agreement was made at inter-governmental level, what form did it take (i.e. was it based on Iran's act in granting the new Concession, coupled with the United Kingdom's in not pursuing its complaint; or on the declarations made on behalf of the parties in the Council), and in either event what were its terms?

Resolution of these issues. In so far as there might be said to be an agreement based on the statements of the parties in the Council, these referred to the settlement of the dispute. It could be argued therefore (as it was in effect argued by the United Kingdom) that if there was a settlement, this implied terms, and that the terms were the terms of the Concession and their continued observance. It could, however, be argued with equal force that the settlement was simply an agreement to discontinue the proceedings because, a new Concession having been granted, there remained nothing further to discuss; but that this did not in itself involve any specific undertaking by the Government of Iran towards the United Kingdom as opposed to the Company. It could even be argued that if there was an undertaking on the inter-governmental plane at all, it was an undertaking not so much by Iran to observe the Concession, as by the United Kingdom not to pursue or re-open the matter before the Council, or otherwise, so long as the Concession was in fact observed: if, subsequently, there was a breach of the Concession by Iran, this would release the United Kingdom from its undertaking, but that would not be the same thing as an undertaking by Iran not to commit any breach. All it would do would be to entitle the United Kingdom to resume its complaint against Iran, on the ground of an alleged violation of the general rules of international law respecting the treatment of foreign nationals and companies. But, as will be evident, this would not have served the purpose of the United Kingdom in the jurisdictional proceedings before the Court in 1952.[1] For the purpose of those proceedings, it was essential for the United Kingdom to bring itself within the terms of Iran's Declaration accepting the compulsory jurisdiction of the Court.[2] In order to do this, it was necessary to show not merely a breach of a general rule of international law by Iran, but the breach (or at any rate the applicability to the case) of a treaty, or other international agreement in the nature of a treaty, entered into by Iran subsequent to the date of Declaration.[3] An undertaking given in 1933, to observe the terms of the new Concession granted to the Anglo-Iranian Oil Company, would have amounted to such a treaty, provided the undertaking was given to the United Kingdom and not merely to the Company. Hence the efforts of the United Kingdom Government to imply such an undertaking from the discontinuance of the proceeding before the League Council on the basis of the Concession. But in these last few words lay the whole difficulty, for it could be contended that the proceedings were discontinued not on the basis of the substantive terms of the Concession and their observance by Iran, but simply of the *grant* of a new Concession *accepted* by the Company. It may be conceded that, if any undertaking at all was given by Iran to the United Kingdom, it would have had no significance except as an undertaking to observe the terms of the Concession: an undertaking to negotiate with the Company, or to grant a new Concession would have had no meaning by that time, for all this had already happened when the Council proceedings were discontinued, and, indeed, constituted the reason for the discontinuance. The real issue therefore was—did there exist any undertaking by Iran at intergovernmental level at all?—or, alternatively, were the Council proceedings discontinued on the basis of some condition looking to the future (or was the discontinuance based simply on the existence of a fact)? The fundamental weakness of the United Kingdom position is most easily seen by asking what consideration or *quid pro quo* would have been given by the United Kingdom in return for the alleged undertaking by Iran to the United Kingdom. The answer made in the proceedings before the Court was that this *quid pro quo* consisted in the settlement of the dispute, and the discontinuance of proceedings the United Kingdom would otherwise have been entitled to pursue. But would the United Kingdom in fact have been entitled to pursue these proceedings once a new Concession had been granted by Iran and accepted by the Company? Theoretically, it is true, the United Kingdom was still possessed of its original ground of complaint, that the cancellation of the old Concession ought not to have occurred, and that it involved a breach of international law. But, even leaving other factors on one side, the proceedings before the League Council were not, as such, legal proceedings; and (at the political and practical level) had not the Council proceedings achieved precisely their object from the United Kingdom point of view,[1] namely, either the re-instatement of the old Concession, or the grant of a new one on acceptable terms?[2] If the cause of complaint before the Council was thus satisfied, the United Kingdom could not in any event have continued the proceedings, and consequently their discontinuance could not have constituted the condition upon which Iran might be supposed, in return, to have undertaken towards the United Kingdom to observe the terms of the Concession. There being no other possible condition upon which such an undertaking could have been given, the irresistible inference was that there was no undertaking: the proceedings were discontinued of necessity, in view of an already existing fact, which rendered them spent or purposeless—and not as part of any specific bargain on an inter-governmental footing. The concluding statements made by the parties before the Council had therefore a formal rather than a substantive significance; they did not embody an agreement but simply registered a fact. So, in effect, the Court held. Following on the passage quoted above, in which it had found that no privity of contract existed between the United Kingdom and Iran by reason of the concessionary agreement as such, which was *res inter alios acta*, the Court went on (ibid.):

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[1] Even in 1932–3 it would not have served for proceedings before the then Court (the Permanent Court), for Iran's Optional Clause Declaration was in the same terms.

[2] For its essential terms in the present connexion see p. 239, n. 2, above.

[3] That is to say, according to the finding of the Court—see again p. 239, n. 2, above.

> 'This juridical situation is not altered by the fact that the concessionary contract was negotiated and entered into through the good offices of the Council of the League of Nations acting through its Rapporteur. The United Kingdom, in submitting its dispute with the Iranian Government to the League Council, was only exercising its right of diplomatic protection in favour of one of its nationals. It was seeking redress for what it believed to be a wrong which Iran had committed against a juristic person of British nationality. The final report of the Rapporteur to the Council on the successful conclusion of a new concessionary contract between the Iranian Government and the Company gave satisfaction to the United Kingdom Government. The efforts of the United Kingdom Government to give diplomatic protection to a British national had thus borne fruit, and the matter came to an end with its removal from the Agenda.'

The Court continued:

> 'Throughout the proceedings before the Council, Iran did not make any engagements to the United Kingdom other than to negotiate with the Company, and that engage-

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[1] And incidentally Iran's since the result was the negotiation of a new Concession giving Iran better terms than the old one (though apparently still not good enough when it came to 1951).

[2] Acceptable to the Company as being at any rate workable terms, even if less favourable than those of the previous Concession.

ment was fully executed.[1] Iran did not give any promise or make any pledge of any kind to the United Kingdom in regard to the new concession. The fact that the concessionary contract was reported to the Council and placed in its records does not convert its terms into the terms of a treaty by which the Iranian Government is bound *vis-à-vis* the United Kingdom Government.'[2]

(The Court might perhaps have developed this last point a little—for the annexing of the terms of a settlement to a report made to an international organ, and its deposit in the records of that organ, may be precisely one of the means of concluding or registering an agreement made at intergovernmental level. That it did not have that effect in the *Iranian* case was due to the fact, first, that the agreement itself (the Concession) was not an inter-governmental agreement; and secondly, that the inter-governmental dispute was not really settled by anything said or done in the Council. What was said and done recorded the existence of a settlement: but a settlement already arrived at *aliunde* (the recording had registrative but not operative effect).)

(*b*) *Status of agreements concluded between governments and foreign private persons or entities.* It is implicit in the attitude of the Court, as evidenced in the above quoted passages from the *Iranian Oil* case, that it did not regard such agreements (in this case a concessionary agreement between a government and a foreign company)[3] as having an 'international' character, in the technical and legal sense of the term.

(i) *The general question of status.* That such agreements, whether looked at from the point of view of the government concerned, or of the private party, have a 'foreign' element does not make them in the technical sense international agreements having treaty status[1] and character. Although it may well fall to an international tribunal to consider and pronounce upon their terms,[2] and although in so doing the tribunal might, by analogy, apply rules of treaty interpretation, such agreements are basically contracts governed by the appropriate system of domestic law, as determined by the applicable private international law (or conflict) rules. Disputes concerning them fall *prima facie* within the competence of the appropriate local of domestic court, or, if referred to arbitration under an arbitral provision contained in them, the arbitration, and the arbitral tribunal, ranks as a private and not an international arbitration and tribunal. The cancellation, repudiation or breach of such an agreement may indeed involve or raise issues of international law that can properly be taken up on the inter-governmental plane, or even be made the basis of an international claim, and of proceedings before an international tribunal;[3] but such cancellation, &c., while it may involve a breach of obligations existing under general international law,[4] is not in itself, or as such, a breach of treaty, or of an obligation in the nature of a treaty obligation. It was not denied by the Court, in the *Iranian Oil* case, that the Iranian action, in so far as it involved a cancellation in 1951 of the 1933 concessionary agreement with the Anglo-Iranian Oil Company, raised issues of international law—and, indeed, there are several passages, both in the 1952 proceedings and in the previous 1951 proceedings concerning interim measures,[5] which suggest that had the Court found itself to be competent and gone on to consider the other issues, it would not have accepted the Iranian contention that the matter was one exclusively of Iranian domestic jurisdiction. But, as has already been explained, for the purposes of the issue of competence, and in order to found an obligation for Iran to submit to the jurisdiction of the Court at all, it was necessary for the United Kingdom to show that the Iranian action gave rise not merely to questions of general international law, but to *treaty* questions, and it was

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[1] The initial suspension of the Council proceedings, while negotiations were entered into between the Iranian Government and the Company, was specifically on the basis that each Government reserved its legal position.

[2] There was also an interesting reference to a somewhat similar point decided by the Permanent Court in the *Free Zones* case (Order of 6 December 1930, Series A, No. 24, pp. 24–43), in which it was held that, a dispute having arisen between the former Kingdom of Sardinia and (in effect) Switzerland *per* the Canton of Valais, in regard to the interpretation of the Treaty of Turin of 1816 (*British and Foreign State Papers*, vol. 7, p. 21); and the King of Sardinia having accepted the interpretation placed by the Canton of Valais on certain provisions of the Treaty, 'this assent given by His Majesty the King of Sardinia without any reservation, *terminated an international dispute* relating to the interpretation of the Treaty of Turin', and that 'accordingly, the effect of the Manifesto of the Royal Sardinian Court of Accounts, published in execution of the Sovereign's Orders (printed in the Permanent Court's Series C, No. 17–1, vol. ii, p. 940), laid down, in a manner binding upon the Kingdom of Sardinia, what the law was to be between the Parties . . .' (*Report*, p. 18—italics added). In the *Iranian Oil* case the United Kingdom invoked this *dictum* —and particularly the passage italicized—as a precedent in support of its argument about the conclusion of the new Concession agreement and the relation of that to the cessation of the Council proceedings. But the Court held (*Report*, p. 113) that was no real analogy, because the whole matter in *Sardinia* v. *Valais* was at inter-governmental level, and no element of any contract with a private entity came into it. This was in effect another way of saying that in the earlier case an inter-governmental dispute was in fact settled on the basis of an inter-governmental understanding, whereas in the *Iranian* case a complaint merely ceased to have any further *raison d'être*, and fell to the ground, when a new private concession was negotiated.

[3] That the United Kingdom Government had a large share-holding in the Company did not affect its juridical status.

[1] The term 'treaty status' is here used in the larger sense, to cover inter-statal agreements generally, and not merely treaties in the more limited sense of, for example, United States usage, as meaning that type which requires Senatorial ratification.

[2] For instance, in an arbitration between governments as to whether an alleged breach of a contract between a government and a private party constitutes a breach of international law, as happened in the third and last phase of the *Ambatielos* case before the Commission of Arbitration in London (see above, p. 227 n. 1), and the *Award* published by H.M. Stationery Office, 4602 of March 6th, 1956. Conversely, a private (i.e. non-inter-governmental) arbitral tribunal acting under such a contract may apply principles of international law to certain aspects of the dispute—see the *Lena Goldfields Arbitration, Annual Digest, 1929–1930*, pp. 3 and 426.

[3] See preceding footnote.

[4] For instance, the action may be arbitrary or discriminatory, or constitute in the circumstances an 'abuse of rights', or involve tortious elements going beyond the simple breach, &c.

[5] Thus the Court said more than once (*I.C.J.*, 1951, pp. 92–93, and 1952, p. 112) that the United Kingdom Government was acting in the ordinary exercise of the right of diplomatic protection in favour of a national abroad, and that allegations of violations of international law and denial of justice were involved.

this that could not be established on the basis, *inter alia*, of the cancellation or breach of the Concession.[1]

(ii) *The question of compatibility with the Iranian optional clause Declaration.* Some of the Judges evidently considered that an additional point was involved, narrower than the one discussed above: even if the Concession could be said to have an international character, and a quasi-treaty status, was it nevertheless the sort of instrument that could be held to fall within the scope of such a phrase as that in Iran's Declaration accepting the compulsory jurisdiction of the Court—'traités ou conventions acceptés par la Perse'? Indeed, Lord McNair went further and thought that, supposing the existence of a parallel (inter-governmental) agreement arising out of the termination of the proceedings before the League Council could be established, this would still be insufficient because the agreement, even if an international one, would not be of the kind contemplated by Iran's Declaration. He said (*I.C.J.*, 1952, p. 121):

> 'With regard to [the] Concession [agreement][2] which was made between the Iranian Government and the Anglo-Persian Oil Company . . . I accept the finding of the Court and the reasoning which supports it. I do not regard it as falling within the expression "traités ou conventions acceptés par la Perse". Neither the circumstances in which it was negotiated, nor the settlement of the . . . dispute between the United Kingdom and Iran which was pending before the Council of the League of Nations, resulted in the creation of a tacit or implied agreement between the United Kingdom and Iran that can be brought within the formula "traités ou conventions acceptés par la Perse".'

It is clear, and it is a point of some importance (*vide infra*), that in arriving at this conclusion, Lord McNair was influenced principally, not by the words 'traités ou conventions' in the Iranian Declaration, but by the words 'acceptés par la Perse', for he went on (ibid.):

> 'Upon the significance of the expression "acceptés par la Perse", I draw attention to the observations of the Permanent Court of International Justice in . . . the *Mavrommatis Palestine Concessions* case. . . .[3] on the meaning of the expression "international obligations accepted by the Mandatory," and to the observations of Lord Finlay and Judge Moore to the same effect.[4] . . . The words "acceptés par la Perse" would not be

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[1] The United Kingdom, of course, pleaded the existence of other post-1932 treaties (for significance see p. 251, n. 1, below), which, however, being between Iran and third countries, the United Kingdom sought to relate to a treaty (but a pre-1932 treaty) of its own with Iran, through a most-favoured-nation clause.

[2] It was actually termed the 'Concession *Convention* of 1933', but this did not make it international.

[3] Judgment No. 2 (Jurisdiction) Series A, No. 2, at p. 24.

[4] The Permanent Court (p. 24) said that these words 'obviously contemplate obligations contracted, even though, in a sense, it may be said that the whole body of international law has been accepted by States'. Lord Finlay (p. 47) said: 'It is quite impossible to apply these words, "international obligations accepted", to international law either generally or in any particular respect. The words obviously refer to conventional obligations by treaty or other agreement; provisions of international law do not require acceptance to be binding but are binding by the sanction on which all international law rests, the general consent of nations.'

Judge Loder, speaking of the same phrase (p. 68), said: 'In my opinion the word "accepted" applies only to obligations specially assumed. . . .'

> apt to describe a tacit or implied agreement, [even] if any such an agreement had arisen. Some meaning must be given to the word "acceptés".'

Lord McNair evidently thought that the term 'acceptés' pointed to an agreement in respect of which there had been some overt act of *specific* acceptance, directed to it as such, not to a case where the existence of an agreement was subsequently to be inferred or implied (if that were the case) from the behaviour of the parties. He did not, however, seem to suggest that in the absence of the word 'acceptés' an implied or tacit agreement or undertaking would necessarily have been excluded, as not constituting technically a 'traité ou convention'. The point has some general importance for reasons discussed below. Judge Hackworth, on the other hand, while expressing no view as to the status of the alleged 'parallel' inter-governmental agreement, said in respect of the Concession (loc. cit., p. 137):

> '. . . the Concession Agreement—between Iran and the Anglo-Iranian Oil Company . . . cannot be regarded as a treaty or convention in the international law sense and consequently cannot be regarded as coming within the purview of the Iran Declaration.'

But here again it does not follow that any special importance was attached to the terms treaty or convention as such: in other words, the Concession Agreement was not an *international agreement* in the international law sense, and therefore did not fall within the scope of a Declaration that used language clearly confined to, or envisaging, agreements that were international in that sense. The same may perhaps be said of Judge Read's view when, after having expressed the opinion that the question *whether* there was a 'parallel' inter-governmental agreement arising out of the League Council proceedings, was an issue of merits that ought not to be determined by the Court as, or as part of, a purely jurisdictional issue, he continued (loc. cit., p. 149):

> 'I have reached the conclusion that the competence of the Court at this stage is limited to deciding whether the alleged international agreement, assuming that the United Kingdom's contentions as regards its nature and scope are well founded, is a treaty or convention within the meaning of the [Iranian] Declaration.'

(*c*) *Character of a treaty*. The foregoing quotations and observations adumbrate the question of what is meant by or included in the term 'treaty' or 'treaties and conventions'. Judge Levi Carneiro in effect raised this matter in the *Iranian Oil* case, in consequence of the different view he took as to the character of the Concession, which he thought (loc. cit., pp. 152–3) could not 'be regarded simply as a private convention'. He added later that the 'contract of the Anglo-Iranian Company might be regarded as a 'convention' of an international scope—even though it is not itself international . . .'; and, on the general point, and with reference to Iran's optional clause Declaration, he thought that 'we might regard the jurisdiction as having been accepted . . . with regard to all "conventions" provided that they have an international significance[1] even if they have not been signed by the representatives of the two Governments'. Despite these views, however, Judge Levi Carneiro did not think the Court could assume jurisdiction, because Article 36, paragraph 2, of the Statute of the Court (the 'optional clause'), which indicates the matters in respect of which any country could accept the Court's jurisdiction as compulsory, only specified in sub-paragraph (*a*) 'the interpretation of a treaty'. The suggested interpretation of Iran's optional clause Declaration 'might, however, result in giving it a scope wider than that of the jurisdiction of the Court, which is limited by Article 36, paragraph 2; that is to say, the jurisdiction would be extended to the interpretation of any "international engagement".' This he 'would regard as desirable, but it is not yet a fact'. He concluded (ibid., p. 153):

> 'As the Concession Agreement . . . is not a treaty, it follows that the dispute in regard to its execution does not constitute a ground for the Court's jurisdiction.'

Although this conclusion was in itself perfectly correct, it is difficult to accept the restrictive view taken of the effect of the words 'the interpretation of a treaty' in Article 36, paragraph 2, of the Statute. Judge Levi Carneiro himself disliked that view, and thought that this sub-paragraph ought to have been worded 'the interpretation of any international engagement'.[2] This he thought would have been more in consonance with the language of sub-paragraphs (*b*), (*c*), and (*d*) of this provision, and the general character of such phrases as 'any question of international law'; 'any fact which . . . would constitute a breach of an international obligation'. Following on a reference to sub-paragraph (*d*), 'the nature or extent of the reparation to be made for the breach of an international obligation', and evidently regarding 'international obligations' as covering 'international engagement', he concluded (ibid).:

> 'If the Court can have jurisdiction in regard to the *consequences* of an international engagement, how can it be argued that its jurisdiction cannot extend to the *interpretation* of all international engagements, or that it must in all cases be limited to the interpretation of *treaties*.' [Italics added.]

It is submitted that Judge Levi Carneiro's fears were groundless, and that the term 'treaty' in sub-paragraph (*a*) of Article 36, paragraph 2, of the Statute is in fact to be read as relating to any agreement having the character of, or being an international agreement; that it cannot be regarded as being limited to instruments having the formal or protocollary characteristics of a 'treaty',[1] except in those cases where the terms of the relevant optional clause Declaration clearly envisage such instruments only.[2] Any other view would mean that States could not accept the compulsory jurisdiction of the Court in respect of instruments that were not strictly 'treaties', or that if they did, the Court could not act on such an acceptance. This is certainly not the position. Such a view would also run counter to the fact that the term 'treaty' (unless clearly intended in its special sense as confined to 'treaties proper') is normally understood, and has for long been used as a general term to denote or cover all international agreements whatever their form or appellation,[3] just as it is well established that the binding character of an instrument that is in fact an international agreement does not in any way depend on its being cast into any particular form, or having any particular appellation. This was laid down by the Permanent Court in the *Germany–Austria Customs Régime* case (Series A/B, No. 41, p. 37) where it was stated (p. 47) that 'From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes'.[4] It is therefore only if the context of any provision, clause, statement or declaration is such as clearly to limit the case to that class of international agreement which can be said to constitute treaties proper that such a limitation can be implied. The matter is one of considerable importance, even apart from the interpretation of Article 36, paragraph 2, of the Statute, and Declarations made under it, for owing to the great number and diversity of terms that can be, and have been, employed in naming or describing international agreements, the existence and use of a generic term to cover all these classes of instruments is a matter not merely of convenience but of virtual necessity. Apart from the term 'international agreement' itself (which is, in fact, often employed for the purpose, but which is cumbrous, and not always quite appropriate), there is no term but 'treaty', and this also has the advantage of antiquity and tradition.[5]

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[1] As in effect happened in the *Lena* case—see p. 246, n. 2, above.

[2] It would not, however, be possible to accept the view, perhaps implied, that the Concession would, on this basis, have ranked as an inter-governmental agreement.

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[1] E.g. the *title* of 'treaty', recitals as to the appointment of plenipotentiaries, the exchange of full powers, provisions for ratification, sealing and other *clauses de style*.

[2] For instance, such a Declaration might use those terms in the sense of the United States usage of the term 'treaty' (see p. 246, n. 1, above).

[3] See, for instance, Louis Renault, *Introduction à l'Étude du driot international* (1869), pp. 33–34, when he speaks of treaties as 'tout accord intervenant entre . . . états, de quelque manière qu'il soit constaté (traité, convention, protocol, déclaration commune, échange de déclarations unilatérales)'. See also Rousseau, *Principes généraux du droit international public* (1944), vol. i, p. 125; *Harvard Research*, Part III (1935), p. 686; and Myers, op. cit., p. 230, n. 1, above.

[4] Cited in Sir Hersch Lauterpacht's *First Report on the Law of Treaties* rendered to the International Law Commission of the United Nations (U.N. Document A/CN.4/63, of 24 March 1953) in which see pp. 35–47 generally, on the present topic.

[5] It is true that Article 102 of the United Nations Charter (registration) speak of 'every treaty and every international agreement entered into by any Member of the United Nations', instead of 'and every *other* international agreement'; but this is simply bad drafting—if it had to be taken at its face value, it would imply that a treaty is *not* an international agreement, whereas it is *the* international agreement par excellence.

(2) Aspects of consent

(*a*) *Res inter alios acta.* The passage quoted in full on pp. 86–87 of the article in this *Year Book*, 32 (1955–6), ending with the words 'A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*', had reference to a special case. The United Kingdom, not having any post-1932[1] treaty with Iran, was endeavouring, nevertheless, to bring itself within Iran's optional clause acceptance by arguing that Iran had committed breaches of certain post-1932 treaties with other countries, the benefits of which the United Kingdom had a right to claim by virtue of the most-favoured-nation clauses of the Anglo-Iranian treaties of 1887 and 1903; but these being pre-1932, the Court (as explained in the article referred to) held that since, as between the United Kingdom and Iran, the right to claim the treatment in question arose from these older treaties, the matter was not covered by Iran's optional clause Declaration.[2] There is no doubt as to the general validity of the principle *res inter alios acta* in relation to treaties, even if this was a rather special application of it. But the principle must not be understood in the sense that a treaty can never have effects outside its own borders, so to speak, or as regards third States. It will certainly do so as regards *rights*, at any rate—or benefits, in the case of the *stipulation pour autrui*, where a treaty expressly stipulates for, or, by clear implication, confers an interest, right or benefit on a third State, and where an obligation to act accordingly can be claimed, if not by the third State itself (a question which raises issues too extensive to be gone into here), at any rate by the parties of the treaty from each other and *inter se*. A most-favoured-nation situation is itself precisely a case in which a right to certain treatment arises in part[3] from the operation of a treaty to which the beneficiary of the clause is not a party. The real meaning of the principle *res inter alios acta* is that a State cannot be *bound* by a transaction to which it has not given its *consent* in some shape or form;[4] but, in its application to the treaty sphere, this does not necessarily mean that a State cannot be bound by a treaty, or by terms in a treaty, to which it is not an actual *party*. If a country accepts benefits under a treaty, it will be bound by any provisions in the treaty as to the conditions, circumstances or extent of the benefits. If a treaty made between a limited number of countries provides a right of passage for the ships of all countries through a waterway situated in the territory of one of them, countries whose ships avail themselves of the right will be bound by any conditions or limitations on it contained in the treaty. If a country accepts a guarantee of its neutrality from other countries, it may, though not a party to the actual treaty of guarantee, come under an obligation to conform to certain limitations on its freedom of action implied by the guarantee and its acceptance—for instance not deliberately to compromise its neutrality. Even if it can be argued that in some of these cases what really happens is simply that, if the conditions are not observed, the rights or benefits cannot be claimed, yet in others—for instance the guarantee case—there may arise a situation of quasi-obligation to conform to a course of conduct provided for or implied by a treaty to which the State concerned is not a party. On the other hand, the principle *res inter alios acta* applies fully to prevent benefits being forced upon a State that does not want them, or simply to suit the policies of other States, and thus being made the basis of a claim of obligation. The principle that a State cannot be bound by a treaty without its consent received positive affirmation from the Court in the *Reservations* case, when it said (*I.C.J.*, 1951, p. 21):

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[1] Iran's Optional Clause Declaration came into force in 1932, and only applied (as the Court found) to disputes about treaties accepted by Iran after that date.

[2] See, however, the interesting opinion in the contrary sense expressed by Judge Hackworth and commented on in this *Year Book*, 32 (1955–6), pp. 87–88.

[3] In part, because also in part from the operation of a treaty to which the beneficiary *is* a party, namely, the one in which the most-favoured-nation clause figures.

[4] The form of consent may of course be tacit, or an inference from conduct.

> 'It is well established that in its treaty relations a State cannot be bound without its consent . . .',

and again, on p. 26,

> '. . . no State can be bound by a [clause][1] to which it has not consented . . .'.

The jointly dissenting Judges in the same case (Guerrero, McNair, Read and Hsu Mo) also, in effect, made the same point when they said (p. 32) that the 'quasi legislative' character of certain treaties

> '. . . must not obscure the fact that the legal basis of these conventions, and the essential thing that brings them into force, is the common[2] consent of the parties.'

(*b*) *Agreement by conduct—Usage and sufferance as constituting agreement.* It is implicit in some of the examples given in the foregoing subsection that agreement, or at any rate acceptance giving rise to agreement, can result from conduct; and it was also suggested earlier (see above, pp. 224–5) that a tacit *revision* of the terms of a treaty might be deemed to have been effected through the subsequent practice or conduct of the parties in relation to it. This is of course a general principle of contract law, in no way peculiar to treaties and other international agreements, yet desirable to emphasize in connexion with them on account of the great preponderance of the written word in the international field, and the difficulties of proof often attendant upon its absence. In the *Morocco* case, the jointly dissenting

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[1] The actual word was 'reservation', but the same principle applies, since a reservation, if accepted, introduces in effect a species of modification—a clause of exception—into the treaty, in favour of the reserving party.

[2] Although the object here was to stress the invalidity of unilateral reservations not provided for by the Convention itself, the principle involved is of quite general application.

Judges (Hackworth, Badawi, Carneiro and Rau) made a special application of this principle as regards evidence of the existence of an agreement deriving from a prolonged course of usage or sufferance (*I.C.J.*, 1952, p. 220):

> 'Usage and sufferance are only different names for agreement by prolonged conduct, which may be no less binding than agreement by the written word.'

(3) RETROACTIVITY—THE 'SIMILAR CLAUSES THEORY'.

(*a*) *The 'Similar clauses theory'*. In the *Ambatielos* case (1st Phase), the Court rejected the 'similar clauses theory' put forward by the Greek Government, and did so largely because the effect of accepting it would have been to give retroactive effect to a clause in a treaty which, as a whole, did not have such effect. The 'similar clauses theory' propounded that when a later treaty terminates an earlier one, but reproduces a number of the substantive provisions of the earlier treaty, either in identical or in very similar terms, then an alleged breach of such a provision in the earlier treaty (occurring when it was still in force though it no longer is so now) can, for the purposes of the application of a provision for arbitration or judicial settlement in the later treaty, be regarded as if it were an alleged breach of the corresponding provision of that treaty, even though it was not in force when the acts complained of occurred; and that in consequence, any dispute about the alleged breach could be held to be arbitrable or justiciable under the disputes clause of the later treaty. The Court (*I.C.J.*, 1952, p. 40) rejected this theory, because *inter alia*, to accept it

> '... would mean giving retroactive effect to Article 29 [the disputes clause] of the Treaty of 1926,[1] whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, comes into force . . . upon ratification.'

In short, the disputes article was not in force when the acts complained of occurred and could not relate to them.[2] The Court did not, however, reject in principle the idea that a treaty might have some retroactive effect, if its language clearly warranted that interpretation, and it went on to say (ibid.) that the conclusion that Article 29 of the 1926 Treaty was not retroactive

> '. . . might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.'

(b) *Presumption against retroactivity—Its effect as regards the entry into*

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[1] As to the significance of the dates here involved, see above, Division A, § 1, subsection (4), under 'Major Principle IV'; and § 2, subsection (5), above.

[2] However, this point was not really conclusive in itself—see under subsection (*b*) below.

force of treaties. It would seem that the presumption must always be against the retroactive effect of a treaty provision.[1] In the passage quoted above the Court relied on a provision that brought the treaty as a whole into force on ratification, and from this it seems to have inferred that, no part of the treaty having been in force earlier, no part of it could be applicable to events occurring earlier. If this was the basis of the Court's reasoning, was the inference justified? There is a clear distinction between the question of the date when a treaty (or any particular provision of it) comes into *force*, and the question of the scope (including the temporal scope) of its *application.* A treaty may not come into force until a certain date, so that no provision of it is operative before that date, and yet the effect of entry into force when it occurs may be, precisely, to make operative a provision which, on its terms, has retroactive effect: the obligation to apply the provision retroactively does not exist before a certain date, but that fact does not prevent the obligation arising when the date is reached—on the contrary it causes it to do so. The fact that, in the *Ambatielos* case, the relevant treaty only came into force on ratification, really had no bearing on the question whether retroactive effect was to be attributed to one of its clauses. This is always a question of substance depending on the terms of the particular provision, though it is clear that, in these circumstances, only positive language can suffice to produce the retroactive effect. But the presumption against retroactivity may, by analogy, have a bearing on the question of entry into force itself. Most treaties indicate of themselves the date of their entry into force. Even where this is not done expressly, it is usually possible to infer it—for instance a treaty which is made subject to ratification will, if nothing else is said, automatically come into force on the exchange of ratifications, or on the date of deposit of the last ratification. If the treaty is not subject to ratification, and is not such that a requirement of ratification must be implied, it will, in the absence of any contra-indication, be deemed to come into force on signature or other equivalent date (as for instance the date of an exchange of notes, or of the last note in such an exchange, if the agreement takes that form).[2] There may, however, remain cases where, in the absence of any definite indication, express or inferential, there may be a genuine choice of alternative dates. In such a case it would seem that the presumption of non-retroactivity would, by analogy, indicate the choice of the *latest* of the alternative possible dates.

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[1] Judge Levi Carneiro made this point in effect when he said, in the *Ambatielos* case (*I.C.J.*, 1952, p. 54), in regard to the retroactive effect of procedural and jurisdictional provisions, that 'in the sphere of international law, such an application can only be allowed when it is expressly provided for'.

[2] See the author's *First Report on the Law of Treaties* rendered to the International Law Commission of the United Nations (U.N. Document A/CN.4/101 of March 14th, 1956, pp. 40–41 and 74–75; now published in the *Year Book of the International Law Commission* (1956), vol. ii (A/CN.4/Ser. A/1956/ Add. 1), pp. 116 and 127).

(4) INSTRUMENTS ACCOMPANYING, CONTEMPORANEOUS WITH, OR ANCILLARY TO A TREATY—WHETHER AN INTEGRAL PART OF THE TREATY—EFFECT OF THE FORM OF RATIFICATION—TERMINATION BY REPLACEMENT—STATUS OF AN INTERPRETATIVE DECLARATION

(*a*) *Statement of the general issue.* In the first phase of the *Ambatielos* case, the point on which the jurisdictional issue chiefly turned was whether a Declaration signed contemporaneously with, but separately from, a particular treaty, and dealing with a matter which, though equally separate, had a certain connexion with it, formed an integral part of the treaty, so that any dispute concerning the interpretation or application of the Declaration would be governed by the adjudication clause of the treaty, providing for a reference to the Court.[1] There was a narrower issue, which, for several of the dissenting Judges, was a determining factor, namely, whether, even if it was in a sense part of the treaty, the Declaration concerned could be regarded as a 'provision' of the treaty—the adjudication clause of the latter relating to 'any dispute . . . as to the proper interpretation or application of any of the provisions of the present Treaty . . .'. It is clear that a question of this kind can never be determined on a purely *a priori* basis, but must depend on the circumstances and the language used. As Judge Zorićić said (*I.C.J.*, 1952, p. 75):

> 'The question whether a separate provision adopted by the parties on the occasion of the conclusion of a treaty should or should not be considered as an integral part of the treaty . . . depends—in the absence of any rule on that point[2]—entirely on the circumstances of each individual case.'

The matter is not therefore in itself one of general import. Nevertheless, points of principle arose in connexion with it. The Court considered it to be partly a question of form, partly one of substance.

(*b*) *The question of form—Character and effect of routine acts.* The Court attached importance to certain mechanical features, such as the form and method of ratification, which, as will be seen, some of the dissenting Judges regarded as matters of routine or traditional usage from which no safe conclusions could be drawn as to the real status of the Declaration concerned. On the actual language of the Declaration, as the Court itself pointed out (*Report*, pp. 41–42), there was much to suggest that it was not part of the treaty. It did not refer to 'this Treaty' or to 'the present Treaty', but to 'the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date', as being quite a separate instrument. The Declaration also did not state itself to be part of the treaty, and a comparison with a Greco-Italian commercial treaty, signed only four months later, showed that of two accompanying Declarations, one stated itself to be an integral part of the Treaty, but the other did not—that latter (to use the language of the Court) 'being almost identical in form and purpose with the 1926 Anglo-Greek Declaration with which the Court is now concerned.'[1] To set against these considerations, the Court had regard to a number of purely circumstantial and mechanical features (or perhaps 'editorial', would be the better term): namely, (i) that the parties included or bound up with the Treaty, a Customs Schedule which was undoubtedly part of it, and also the Declaration, in a single, consecutively paged document; (ii) that these three instruments were issued in the United Kingdom Treaty Series as a single document entitled 'Treaty of Commerce and Navigation between the United Kingdom and Greece and accompanying[2] Declaration'; (iii) that the parties registered the relevant texts with the League of Nations, which led to their inclusion in the League of Nations Treaty Series under a single number, as 'No. 1425. Treaty of Commerce and Navigation between the United Kingdom and Greece and accompanying[2] Declaration signed at London, July 16th, 1926'; and (iv) that the parties ratified the Treaty in a certain form.

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[1] See as to this p. 212, n. 2, above.

[2] It is clear from the French text, which was the original (*à défaut de toute règle à ce sujet*), that Judge Zorićić was in fact *asserting* the absence of any general rule.

Character and effect of instruments of ratification.—On the Greek side, the ratification took the form of a statement that the Treaty had been signed in London on a certain day 'with annexed Customs Schedule and Declaration, the texts of which follow' [and there followed all three texts]. The instrument of ratification then continued 'We accept, approve and ratify the Treaty, the Customs Schedule and the Declaration in all their provisions. . . .'. From this, the Court concluded that, as the Greek ratification 'made no distinction between the Treaty, on the one hand, and the Customs Schedule which is indisputably part of the Treaty, and the Declaration, on the other', it was therefore 'clear . . . that Greece treated the Declaration as a part of the Treaty'.[3] The United Kingdom's instrument of ratification was considered by the Court to be 'even more explicit' because, after a recital which only mentioned the signature of a treaty on a certain date, the instrument went on 'which Treaty is, word for word, as follows': and then proceeded to set out verbatim not only the Treaty but also the Customs Schedule and Declaration, finally ending with the formula 'We, having seen and considered the Treaty aforesaid, have approved, accepted and confirmed the same in all and every one of its articles and clauses, . . .'. From this, and especially from the use of the phrase 'which Treaty is, word for word, as follows' and the ensuing setting out of all three texts, it was held to be 'clear that the United Kingdom also regarded the Declaration, as well as the Customs Schedule, as included in the Treaty'. The Court concluded with the following important pronouncement of principle (*I.C.J.*, 1952, p. 43):

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[1] This fact leads to the following rather curious position: that since, as will be seen, the Court found the Anglo-Greek Declaration to be part of the Treaty, not merely on grounds of form but also on grounds of substance connected with its purpose, the same conclusion must necessarily have been reached in any corresponding dispute about the Italo-Greek Declaration, the 'form and purpose' of which were regarded by the Court as being 'almost identical' with the Anglo-Greek. Thus the Court would have found itself obliged to hold that *both* the Italo-Greek Declarations were an integral part of the relevant Treaty, although one of them stated itself to be so and the other not.

[2] That the Declaration *accompanied* the Treaty, and was signed contemporaneously, was not denied; but this did not of course make it *part*, still less a 'provision', of the Treaty.

[3] This reasoning is not altogether convincing, and seems to beg the question whether the Declaration merely accompanied the Treaty or was part of it. The real point was much more that the Greek instrument purported in effect to 'ratify' the Declaration which, however, contained no provision for its ratification, whereas the Treaty did. If therefore (so it could be reasoned) the Greek Government ratified the Declaration, it could only be because it regarded it as part of the Treaty and subject to its ratification clause. Even this was not conclusive, however, for it is always *open* to a government to ratify a treaty instrument if it likes—e.g. for domestic reasons, even though it contains no provision for it, and (internationally) it is unnecessary to do so. There was much

> 'The ratification of a treaty which provides for ratification, as does the Treaty of 1926, is an indispensable condition for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance. When the Government of the United Kingdom speaks of the Treaty in its own instrument of ratification, as being 'word for word as follows' and includes the Declaration in the text that follows, it is not possible for the Court to hold that the Declaration is not included in the Treaty.'

There was clearly much force in this reasoning if the instrument of ratification was to be considered purely on its own, and not against the background of the known habits of chanceries, and the treaty or protocol departments of foreign ministries. Moreover, the Court was clearly entitled, up to a point, to apply a sort of *contra proferentem* principle against the United Kingdom, since it was the latter party which was contending that the Declaration did *not* form part of the Treaty. Nevertheless, in saying that ratification was an act of vital importance and not a merely formal act, the Court said something which was true about the act itself, but not necessarily true about the character of the *instrument* embodying it. Ratification is an act of vital importance in the sense that it brings a treaty into force, but it may nevertheless remain the case that this act is carried out by means of an instrument whose nature is predominantly formal, as also the procedure followed in issuing it. Consequently, the practical conclusion to which the Court's finding may well lead is that chanceries and foreign ministries must in the future pay far greater attention to the forms of such things as instruments of ratification than they have been accustomed to do —that they must revise forms that have in some cases been in use perhaps for centuries, and must in particular not deal with such matters as if they

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more warrant on the basis of the United Kingdom instrument of ratification, for holding that the United Kingdom Government must have regarded the Declaration as part of the Treaty; but this was precisely because the instrument did *not* (like the Greek) separately mention the Declaration, but did include it in setting out the text of the 'Treaty' being ratified.

were matters of pure routine.[1] This routine is for the most part based on practical convenience rather than on a strict legal evaluation of what is being done, and, in particular, it avails itself of the fact that while nothing obliges a country to 'ratify' an instrument that does not require it, nothing prevents it from doing so either, or from including it with other texts in a global instrument. Thus when a number of instruments having a certain connexion or interrelationship are signed together, and one of them requires ratification but the others not, it may nevertheless be thought convenient to include them all in the same instrument of ratification, and to include them in the same document for publication, both in order not to give the impression that the treaty concerned is an isolated instrument, and also in order that officials, and others subsequently dealing with some question regarding the Treaty, or persons purchasing the volume or consulting the series containing it, may have all the texts assembled in convenient form. Yet none of this may be intended to imply or to indicate that the authorities concerned held the view that the accompanying instruments were an integral part of the main one. It was this aspect of the matter that chiefly impressed certain of the dissenting Judges. Lord McNair, before coming to this question, in effect made the point to which attention has been drawn in notes 2 and 3 on p. 256. Conceding (*Report*, p. 60) that the form of the United Kingdom instrument of ratification made it 'necessary to hold that the Declaration was ratified at the same time, and by the same instrument, as the Treaty . . .', he considered that it did not follow from this that it was so ratified as part of the Treaty, or that it was regarded as such:

> 'There arises a different question, namely, whether a global ratification has the effect of making all the documents comprised in it parts of the Treaty which was the main subject-matter of the ratification, unless they would be so incorporated by virtue of the intention of the Parties, express or implied. My answer to this question is in the negative.'

He continued (ibid.):

> 'The question whether documents accompanying a treaty—by whatever name they may be called, Declarations, Protocols, Additional Articles, Exchanges of Letters, etc.—are incorporated in the treaty or not, depends upon the intention of the contracting Parties. The intention to incorporate such a document in a treaty is frequently evidenced expressly by a written stipulation to the effect that it shall form an integral part of the treaty; or, alternatively, it may be implied from the juridical nature of the document and its relation to the treaty.'

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[1] For instance, in many foreign ministries it would not be the normal practice to consult the departmental legal adviser about the form of a ratification unless there was something exceptional in the case. A ratification is usually a common-form instrument of which a supply is kept ready engrossed or printed. When required, a copy is taken from the pigeon-hole or rack, the blanks are filled in as may be appropriate, and the instrument is then submitted to the necessary processes of signature and sealing.

For Lord McNair, therefore, the question whether instruments ancillary to or accompanying a treaty formed part of it was a question of substance, depending on the language and juridical character of the basic instruments themselves, and not on the form of the instrument ratifying them, or under which they were included in a ratification; still less on the simple fact that they were covered by the same instrument as that ratifying the Treaty. After giving a number of examples of the express incorporation of an ancillary instrument in a treaty by a specific declaration of the parties, or by a specific provision to that effect in the ancillary instrument itself, and stating that he would deal later with the question whether, in the case under discussion, any *implied* incorporation had been effected, he went on as follows (loc. cit., p. 61):

> 'It is also suggested that it must be inferred from the expression "which treaty is word for word as follows", occurring in the United Kingdom's Instrument of Ratification, that all the documents (Treaty, Schedule and Declaration) which follow these words must be regarded as forming one treaty. If the history of this phrase is examined, I do not consider that it can sustain this argument.'

He continued (ibid.):

> 'Either in this form or in some such phrase as "duquel la teneur de mot à mot s'ensuit", in Latin, French, English or German, this traditional formula has been in use in treaties and other public documents for at least 600 years. (See, for instance, Dumont, *Corps universal diplomatique du Droit des Gens et Receuil des Traités*, vol. 2, pp. 22–26, where the formula occurs in two Acts of Cession and Renunciation between the King of France and the King of England dated 1360, "de quelles Lettres la teneur de mot à mot s'ensuit", or "de mot en mot", and many similar illustrations throughout the volumes of Dumont; see also a Russian Instrument of Ratification of 1739 in Mervyn Jones, *Full Powers and Ratification*, p. 167, "desquels la teneur suit, transcrite de mot à mot"; and President Washington's ratification of the Jay Treaty of 1794, "which Treaty is word for word as follows: to wit", in U.S. Senate Document No. 26 of 1919, "Ratification of Treaties, Methods and Procedures, etc.", p. 49.)'

Lord McNair then concluded (ibid., 61–62):

> 'The formal parts of treaties, and the documents connected with the making of treaties, such as Full Powers, Instruments of Ratification, Procès-verbaux of Exchange of Ratifications, etc., contain many expressions of an archaic and purely routine character, and I do not find it possible to infer from the expression "which treaty is word for word as follows" the intention of the contracting Parties to incorporate all the documents which follow into the treaty: that is, I do not think that Article 36 (1) of the Statute of the Court envisages as one of the bases of its jurisdiction,[1] so slender a con-

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[1] The point being made here was that Article 36 (1) of the Statute founds the jurisdiction of the Court as comprising 'all cases which the parties refer to it'. The basic jurisdictional issue therefore always is whether *both* the parties have, either jointly or severally, referred the case to the Court or agreed to its being referred there. Translated into the concrete terms of the *Ambatielos* case, this turned on whether the disputes clause of the Anglo-Greek Commercial Treaty of 1926 related to a dispute concerning the effect of the ancillary Declaration. This in turn depended on whether the Declaration ranked as one of the 'provisions' of the Treaty. Lord McNair did not think it could be held so to rank (and thus to found jurisdiction for the Court) on such a slender basis as an inference drawn from a common-form instrument of ratification, drafted in routine and traditional fashion, and certainly not specifically addressed to the point.

> sensual foundation as is afforded by the use of one of these venerable and routine formulas.'

Inferior evidential value of routine acts performed by subordinate officials, as regards establishing State intention. Judge Basdevant, taking a similar line, drew attention to the great difficulty of regarding routine acts as expressing the will of the parties on any question of substance. After pointing out that such acts as the signature of an international agreement, or its ratification in the sense of the *act* of ratification, were 'acts concerned with the substance itself of an international agreement' which could therefore be looked to as evidencing the will of the parties, he continued (loc. cit., p. 69):

> 'But the *recording* of these acts [author's italics] in the instruments which are designed to give them material existence involves the physical operations of writing, printing, transmission by one party to the other, etc., operations which do not contribute to the formation of the will of the contracting States; those who have the task of forming, expressing, or confirming this will,[1] do not, as a rule, take part in these physical operations; these operations commonly take a form deriving from tradition, which is followed scrupulously, and therefore blindly, by the officials entrusted with this material task.[2] It would be wrong to attribute to the details of form thus superimposed upon the juridical act of the conclusion of a treaty any determining influence, when it becomes necessary, in case of doubt, to ascertain the true meaning of the agreement which has been reached, the character which the parties intended to give to [the] . . . agreement. . . .'

Judge Basdevant then pointed out (p. 70) that it was precisely in the important substantive acts that those responsible for expressing the national will had participated in the present case, and that all of these acts pointed away from any intention to include the Declaration in the Treaty. It was these persons who had chosen to use in Article 29 of the Treaty 'the expression "provisions of the present Treaty" and not a more comprehensive expression'.[3] It was they who had chosen to give their agreement about claims based on the former (1886) Treaty the form of a separate instrument, and not of an article in the Treaty itself; who had given this separate instrument the title of 'Declaration' not 'additional article'; 'who saw fit to append their signatures to it, separately from the Treaty, and to make no reference to it in the Treaty, in contra-distinction to what they did in the case of the Schedule which precedes it'. He concluded (ibid.):

> 'All this, for the reasons indicated above, is of greater importance in determining the character of the Declaration than the fact that the Declaration was printed after the Treaty and the Schedule, in one document with consecutive pagination, physical details

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[1] Such as ministers, members of the legislature and higher officials.

[2] Judge Basdevant knew from his own previous experience as Legal Adviser to the French Ministry of Foreign Affairs that, as suggested on p. 258, n. 1 above, this work is normally performed by subordinate officials, not of administrative grade, who are concerned solely with the form and not the substance.

[3] e.g. 'the provisions of the present Treaty and of its ancillary or accompanying instruments'—or it would have been possible to be even more specific.

> which, like others of the same kind, are governed by the action of officials who, unlike plenipotentiaries, were not responsible for elaborating and stating the will of the Parties.'

Nor did Judge Basdevant think it made any difference that the instruments of ratification, although drawn up by subordinate officials on a routine basis, were *signed* by the respective Heads of State; for the latter, in so doing, 'were merely confirming what had already been declared by their plenipotentiaries', and consequently it was still what the latter had done that had to be looked to in order to ascertain the substance of the matter. Moreover (ibid.), the Heads of States

> '. . . did not direct their minds to details, often superfluous or incorrect, which officials, unqualified to interpret, complete or correct the intentions of their Sovereigns, borrowed from forms which they traditionally and blindly followed.'

The foregoing expressions of opinion were certainly not intended to suggest that the administrative or executive acts of subordinate officials do not bind the State, or that the State is not in general responsible for them, or can escape their natural consequences on the ground that they were unauthorized or incorrectly carried out, or had unintended effects. But that was not really the point here. The point was not so much one of State responsibility, as of discovering what the real will and intention of the State was in regard to a given transaction. What Judges McNair and Basdevant were saying was that, in doing this, much greater weight and evidential value should be attached to certain classes of acts than others, and to the acts of certain persons rather than to those of others, and that certain kinds of acts had in their nature very little importance evidentially, and were not acts from which reliable inferences could be drawn. The same view was in effect expressed by Judge Zoričić who, after mentioning the details about ratification, publication and pagination, &c., said (loc. cit., p. 75) that in his opinion 'all these considerations' were 'of secondary importance': it could equally be argued in the opposite sense 'that the Declaration was drawn up and signed as a separate instrument from the Treaty, having a title of its own, and that neither the Treaty nor the Declaration mentions the latter as being part of the Treaty, although the Parties were careful, in Article 8 of the Treaty, to make express mention of the Customs Schedule which precedes the Declaration'. As regards the form and wording of the instruments of ratification, the effect of this, he thought (ibid.) was that

> '. . . the two Governments undoubtedly considered the Treaty and the Declaration as forming part of a simultaneous agreement, and as having to be ratified together, but that in no way proves that the Declaration was "a provision" of the Treaty of 1926 within the meaning, and for the purposes, of Article 29 of that Treaty; still less does it follow that the Parties intended to submit disputes in regard to the application of that

Declaration to the arbitration[1] provided for in Article 29. Again, the Declaration was drawn up subsequently to, and independently of the Treaty . . .'.

Judge Klaestad expressed the same view, but did not develop it, as he adopted Lord McNair's view (see *Report*, p. 81), merely adding (ibid.):

> 'That the two instruments were ratified together and covered by the ancient routine formula for ratifications, does not necessarily mean that the one is to be regarded as part of the other.'

Similarly, Judge Hsu Mo, after referring to various matters of form, including the method of ratification, expressed the view (ibid., p. 85) that all this

> '. . . merely tends to show that the Parties attached equal importance in law and gave the same degree of solemnity to the two documents, but does not necessarily prove that the Declaration is an integral part of the Treaty, much less that Article 29 of the Treaty applies to the Declaration in the same way that it applies to the provisions of the Treaty. The question at issue must be resolved by considering the substance of the Declaration and its relation to the Treaty itself.'

It is difficult to deny that in a matter of this kind it is the substance rather than the form that counts. The Court itself did not rely only on the formal considerations arising out of ratification, method of publication, pagination, &c., but held that, in addition and as a matter of substance, the Declaration formed part of the Treaty. This matter also, raises certain general issues of principle and must be considered.

(*c*) *The question of substance—Terminative effect of a treaty of replacement.* The dissenting Judges in the *Ambatielos* case (1st Phase) took the view that the Declaration accompanying the Treaty of 1926 was not substantively a part of that Treaty because it did not interpret or qualify it in any way. If it qualified or interpreted any treaty, it was that of 1886, because what it really did was to create an exception to the terminative effect of that treaty—a saving for claims based upon its terms and relating to the period when it was in force.[2] Its significance therefore lay in the sphere of, and related to, the termination of the old Treaty, rather than the conclusion of the new. The Court, while conceding that the matter was *connected* with the termination of the old Treaty, took the view that this termination was itself effected by, or resulted from the replacement of the old Treaty by the new. The Declaration therefore created an exception to the replacing effect of the new Treaty, and could in some sense be regarded as qualifying the

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[1] Strictly, the Article provided for *adjudication* (by the Court) not arbitration.

[2] Lord McNair thought it superfluous even for that purpose, on the ground that such claims would have remained alive in any event (see below, subsection (6)). He therefore thought the first sentence of the Declaration, which stated that these claims were not prejudiced, must be regarded as having been inserted only *ex abundanti cautela*. The second sentence, which kept alive for the settlement of such claims the procedure laid down by the 1886 Treaty, was in his view necessary; but what made it necessary 'was not the Treaty of 1926 but the imminent expiry of the Treaty of 1886, which took effect on the 28th July 1926, by reason of its denunciation by the Hellenic Government' (this point is further explained below). He went on: 'The Declaration does not touch or concern anything contained in the Treaty of 1926, but regulates something external and collateral to it.'

Article bringing the new Treaty into force, by doing which it caused the old Treaty to terminate. This view is reflected in the following passage (*I.C.J.*, 1952, pp. 43–44):

> '. . . it is evident that ultimately it was the coming into force of the Treaty of 1926 that finally terminated the operation of the Treaty of 1886. But for the Declaration, Article 32 of the Treaty of 1926, which brought that Treaty into force upon ratification, might, in the absence of any saving clause, have been regarded as putting the Treaty into full operation so as completely to wipe out the Treaty of 1886 and all its provisions, including its remedial provisions, and any claims based thereon.[1] . . . The intention of the Declaration was to prevent the new Treaty from being interpreted as coming into full force in this sweeping manner and thus prejudicing claims based on the older Treaty or the remedies provided for them. It follows that for the proper interpretation or application of the provisions of the Treaty of 1926, some such words as "Save as provided in the Declaration annexed to this Treaty" have to be read into Article 32 before the words "It shall come into force".'

The Court concluded (ibid.):

> 'Thus the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty.'

Admittedly, some warrant for the interpretation which the Court placed upon the situation could be found in the language of the Declaration itself, namely: 'It is well understood that the Treaty . . . of to-day's date [i.e. the 1926 Treaty] does not prejudice claims . . . based on the provisions of the . . . Treaty of 1886. . . .' Had it said 'It is well understood that the termination of the Treaty of 1886 does not prejudice . . . &c.', the matter would have been beyond doubt. But since, on the Court's own showing, the 1926 Treaty came into the matter *because* it terminated the 1886 Treaty, was not (on that view) the substantive effect of the Declaration precisely the same as if the latter form of words had been used? Moreover, it was quite clear that in so far as the Declaration was necessary at all, it was rendered so by the termination of the 1886 Treaty. The Declaration, if needed, would have been needed by the simple termination of that Treaty, even if the 1926 Treaty had never supervened or been concluded. It was not the latter event that, in substance, as opposed to *occasion*, called the Declaration forth. However that may be, a further consideration was involved which led the dissenting Judges to question whether the termination of the 1886 Treaty really did result from the coming into force of the 1926 Treaty. This was that the Greek Government had given notice of termination of the 1886

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[1] Could this really have been the case as regards the claims themselves?—see the preceding footnote. A claim is an acquired or vested right or interest. Whether good or bad on the merits, it does not suddenly become extinguished merely by the demise, however brought about, of the Treaty under which it arose, provided always that it arose—or rather that the events on which it is based occurred—when the Treaty was still in force. *Aliter* perhaps as regards remedial or settlement provisions, though even that is debatable. But only *expressis verbis* could the actual claims have been extinguished.

Treaty as long ago as 1919. By arrangement between the parties, however, the operation of this notice was postponed for successive periods, until, negotiations for a new Treaty being under way, it was agreed that the termination of the old Treaty should take effect on the date of the coming into force of the new. Consequently, what occurred when the new Treaty came into force was not that it directly terminated the old, but that it brought into operation an already existing but suspended denunciation. It was from the latter rather than from the new Treaty that termination resulted. In the original, suspended, Greek denunciation, lay the substance of termination: the coming into force of the new Treaty was merely the mechanism that brought it into play. This view was expressed by Judge Basdevant as follows (loc. cit., p. 71):

> 'The Declaration does not explain any clause of the [1926] Treaty. Nor does it explain its general effect, which has been said to be the abrogation of the Treaty of 1886 by the Treaty of 1926. In fact, not only did the Treaty of 1926 contain no provision abrogating the Treaty of 1886, but it did not effect any tacit abrogation . . . The Treaty of 1886 did not cease to be in force as the result of any express or implied abrogation by the Treaty of 1926, but as a result of its denunciation by the Hellenic Government on March 3rd, 1919. The date upon which this denunciation was to take effect was the subject of a number of postponements, and it was finally fixed as the date of the coming into force of the new Treaty. The coming into force of the Treaty of 1926 thus provided a date adopted by both Parties on which the earlier denunciation would have legal effect; it is not itself the juridical source of the extinguishment of the 1886 Treaty: this extinguishment resulted from the denunciation of the Treaty.'[1]

The same view of the position was expressed by all the dissenting Judges, i.e. Judges Zoričić and Hsu Mo (in even stronger terms), Lord McNair (see p. 262, n. 2 above) and Judge Klaestad.[2] This view clearly derived much support from the fact that neither Article 32 nor any other provision of the 1926 Treaty stated that it would 'replace' the 1886 Treaty, or that upon its coming into force the latter Treaty would terminate or be deemed to be replaced: indeed, the 1926 Treaty contained no mention of or reference to the 1886 Treaty at all, not even in the Preamble.[3] A point of principle is involved here, and one of some importance, seeing the results it led to in the *Ambatielos* case, for it is evident that the Court (i.e. the majority) inferentially read into the Treaty of 1926 a replacement clause, or a clause terminating the 1886 Treaty, or at the least they read into it a general terminative effect, although there was no express provision saying so.[4] Normally, however, one treaty cannot be held to terminate or replace another unless it says so, or unless the parties so provide in some ancillary instrument (e.g. a protocol of signature), or unless an inference to that effect is inescapable because the character and effect of the two treaties is such that in the nature of the case they cannot co-exist—i.e. the one renders the other pointless (superfluous) or contradictory, and over the whole field of the treaties, in which case the later in time prevails, and the other may be said to be replaced and terminated. Even so, it is less a case of termination in the strict technical sense, as of interpreting the two treaties together in such a way that the one is seen to be no longer necessary, and ceases to have any field of operation; or else (in case of conflict), the other prevails. There is in fact no principle of treaty law requiring the automatic termination of one treaty solely because another treaty in the same field is concluded between the same parties. Two such treaties can perfectly well co-exist on the basis that, in so far as they really do cover the same ground, in such a way that it would be futile or contradictory to apply both, the later of the two will prevail, and, in effect, the corresponding clauses of the earlier will determine by obsolence or direct supersession; but that as regards any clauses of the earlier treaty in respect of which this is not the case, these will remain in force unless the parties expressly terminate or replace them. In the *Ambatielos* case, the Court's conclusion was motivated partly by the reference to the 1926 Treaty contained in the Declaration itself, and partly by the way in which the parties had continually put off giving effect to the Greek denunciation of the 1886 Treaty until they could conclude a new one, leading to an inference that they intended the new treaty to replace and terminate the old.[1] But the conclusion thus arrived at on the particular facts of the *Ambatielos* case should not be allowed to obscure the position that complete termination or replacement is not necessarily the result of a new treaty, even between the same parties, even on the same subject matter. If it does result, this will be because the parties have expressly so provided,

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[1] A more literal rendering of the original French would be 'this extinguishment remains the consequence of the denunciation of which that Treaty was the object'.

[2] See *Report*, pp. 64, 76–77, 81 and 85–86.

[3] In the case of deliberate replacement it would be very usual to find a phrase in the preamble reciting that the parties 'Desiring to replace the X Treaty by a new Treaty' or 'Desiring to negotiate a Treaty in lieu of the Treaty of . . .'.

[4] This can be seen from the passage from the judgment quoted above (at the beginning of the present head (*c*)). The opening sentence, not there given in full, runs: 'From the series of

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instruments which from time to time continued the Treaty of 1886 in force after its initial denunciation by Greece, it is evident that ultimately it was the coming into force of the Treaty of 1926 that finally terminated the operation of the Treaty of 1886.' The inference involved can be seen even more clearly from a passage in Judge Levi Carneiro's concurring but separate opinion (*Report*, p. 53): 'It is true that the Declaration relates to the Treaty of 1886, in that it saves claims. . . . based on . . . that Treaty. . . . Now, this safeguard only became necessary because a new treaty made its appearance in 1926.'

It has been seen above, however, that this was not the case. If necessary at all, the Declaration would have been necessary whether the new Treaty was concluded or not. It was from the termination of the old one that its necessity arose. Any other view assumes what would by no means have followed, i.e that if no new Treaty had been negotiated, the older one would not in fact have terminated, because the parties would have kept the Greek denunciation indefinitely in suspense.

[1] However, there still remains the point, of which the Court did not apparently take account, that this intention was not expressed in the new Treaty itself, but in a separate agreement. It was this separate agreement, not the Treaty, which actually lifted the ban on the Greek denunciation. The coming into force of the new Treaty was merely used as mechanism.

or because the inference is inescapable when the terms of the two treaties are read together (and even so, this may be an inference that can only be drawn as regards some of the provisions involved).[1]

(*d*) *Status of an interpretative Declaration attached to a treaty.* In what has been said in the previous subsections, the issue has been in what circumstances an ancillary or accompanying instrument can be said to 'interpret' a treaty. There can, however, be no doubt that if and in so far as it does do so, it must be deemed to be an integral part of the treaty, and that the Court was fully justified, as a matter of *general* principle, in saying in the *Ambatielos* case (1st Phase), in the passage already quoted above (head (*c*)), that where 'the provisions of [a] Declaration are in the nature of an interpretation clause . . . [they] should be regarded as an integral part of the Treaty'. This may be compared (see above, Division A, § 1, subsection (4), 'Miscellaneous Points', (*f*) (ii)) with the somewhat similar conclusion arrived at in the author's 1951 article (p. 13) as to the status of interpretative statements or declarations embodied by the parties in documentary form during, and as part of, the *travaux préparatoires*, on the basis of the four-Judge minority view in the (*First*) *Admissions* case.[2] Judge Levi Carneiro expressed the same view in the *Ambatielos* case, citing with approval (*I.C.J.*, 1952, p. 53) a reference to a French decision in which the Tribunal was stated to have 'held that the interpretative declarations must be read with and deemed to form part of the text of the treaty, and were binding on the courts'.[3]

(5) SUBSTANTIVE CHARACTER OF RATIFICATION

(*a*) *What it is that is 'ratified'.* In the previous subsection (under (4) (*b*)), consideration was given to the formal aspects of ratification, particularly as regards the character of the *instrument* of ratification. In the *Ambatielos* case (1st Phase), the Court, as has been seen, stressed the substantive character of the *act* of ratification: because (or at any rate in those cases in which) it brought the Treaty into force, it was an 'act of vital importance' and could never be a 'mere formal act'—(above, p. 257). Nevertheless, as the dissenting Judges insisted, the 'recording' of this act is a predominantly routine operation, and the instrument in which it is recorded and conveyed has an essentially formal and traditional character, from the precise language of which these judges thought it was dangerous to draw too definite an inference as to the exact intentions of the parties in regard to the *substance* of the treaty. In this connexion, Judge Basdevant brought out a point of some importance—usually obscured by the common use (both in general parlance and, often, in instruments of ratification) of the phrase 'to ratify a *treaty*'; whereas strictly, what is ratified on both sides is the *signature* which the plenipotentiaries have appended to the Treaty, or alternatively, the act of the plenipotentiaries in concluding it.[1] In a phrase already partly quoted (above, p. 261) Judge Basdevant said that, in signing an instrument of ratification (an 'act by which they confirmed the agreement reached by their respective Plenipotentiaries and by which they gave the Declaration a definitive character of the will of the contracting States'), the Heads of State concerned were 'merely confirming what had already been declared by their Plenipotentiaries'. The importance of this (both in the given case and generally) is that it still remains the original instrument so declared or concluded that must be looked to for the true expression of the will of the parties. It follows that only in those cases in which a specific reservation is attached to a ratification can it be inferred that the ratifying authority is intending anything other than, or different from, what the plenipotentiary did on its behalf.[2]

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[1] For another aspect see subsection (7) below.

[2] *I.C.J.*, 1948, p. 87.

[3] *Comptoir Tchécoslovaque & Liebken* v. *New Callao Gold Mining Co.*, Civil Tribunal of the Seine, 4 March 1930; *Clunet*, 57 (1930), p. 960; *Annual Digest, 1929–1930*, Case No. 234—cited by Mr. A. B. Lyons's article 'Conclusiveness of the Statements of the Executive: Continental and Latin-American Practice', in this *Year Book*, 25 (1948), pp. 201–2.

(*b*) *The distinction between the domestic and the international aspects of ratification.* In a passage already referred to (above, p. 261) from the *Ambatielos* case (first Phase), Judge Basdevant defined the place of ratification as follows:

> 'The drafting and signature of an international agreement are the acts by means of which the will of the contracting States is expressed; ratification is the act by which the will so expressed is confirmed by the competent authority for the purpose of giving it binding force.'

Later, he spoke of those who, respectively, had 'the task of forming, expressing or confirming this will'. In these passages Judge Basdevant left it open who the competent authority is. How far, and in what sense, is that question in fact an open one? On the domestic plane, it is, of course, for the constitution of each separate country to designate the ratifying authority—whether the executive alone, the legislature alone, or a combination of the two. But on the international plane, ratification is, as an international act, and like all such acts, the act of the State as a single and indivisible juristic international entity. On the international plane, the State can only act through its sovereign, head of State, or government (i.e. the executive authority), and ratification is therefore, internationally, the act of the executive and not of the legislature. It may be the legislature that (domestically) places the executive in a position to ratify, but this, *per se*, has no international effect: it is still the executive which (internationally) must do the ratifying.[1] In recent years, however, attention has tended to be concentrated less on the traditional aspect of ratification, as the act whereby the sovereign, head of State or other executive authority confirms the act of its plenipotentiary, as on the more modern aspect, according to which 'ratification' by the legislature constitutes a principal means whereby the legislative authority can control and check the action of the executive. This, in itself, would be of political rather than legal significance, but for the controversy to which it has given rise, as to whether a ratification apparently validly effected by the competent executive authority on the international plane, but without the necessary constitutional processes having been gone through, in fact makes the country concerned a party to the treaty none the less—or not. The nature of ratification as described above, considered as an international act, would seem to require an affirmative answer to this question. Basically, the issue is one of State responsibility; and the broad principles that a State can only act on the international plane through its executive arm, and that the acts of the latter on that plane, executed in due and regular international form, bind the State, are applicable here.[2] States cannot be deemed to be upon notice of one anothers' constitutional requirements, and have no choice but to accept as authentic, and as having international effect, the acts of another State carried out on the international plane and in its inter-statal capacity. The defect, if defect there be, is on the internal or domestic plane, and must be cured by domestic or internal means. If it cannot be, there may be legitimate steps which the State can take on the international plane to terminate or obtain release from its obligations.[3] This view received striking confirmation[4] from Judge Hackworth in the *Iranian Oil* case when (see Division A, § 1, subsection (4) under 'Major Principle V, p. 224, n. 3), referring to the question of interpreting an international Declaration by reference to a domestic law, he said (*I.C.J.*, pp. 136–7) that the Court:

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[1] See the present writer's *First Report on the Law of Treaties* (see above, p. 254, n. 2), Article 31 and n. 20 on p. 60 (n. 30 on p. 122 of the 1956 publication).

[2] The validity and effect (internationally) of any such reservation is, of course, another matter.

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[1] Thus to take the most conspicuous example, the President of the United States could not (constitutionally) deposit or exchange the United States ratification of a treaty without a previous 'ratification' by the Senate. But the latter is not *per se* a ratification internationally: *that* is the act of the President. Should the President *not* act—and however unconstitutional this might be domestically—the United States would not be a party to the treaty, and no amount of Senatorial 'ratification' would make it so.

[2] It may be argued that a State which purports to become a party to a treaty when not constitutionally authorized to do so, incurs responsibility in *damages*, in so far as it has misled other States, but does not thereby necessarily become a *party* to the treaty—that responsibility would indeed only arise if it does *not* become a party. This is true in a sense, but it begs the central question: is there a mere purporting, or an (internationally) valid act? It also ignores the fundamental indivisibility of the State on the international plane. The case may be compared to that of a man who signs a contract in the ordinary way, and afterwards denies that it is binding upon him, on the ground that he unfortunately failed to observe his private custom of crossing himself when signing, or omitted to consult his wife.

[3] e.g. the treaty may allow notice of termination to be given—or an explanation of the position to the other parties may procure a voluntary release.

[4] All the more significant coming from a Judge of a country where special stress is laid on the domestic aspects and importance of ratification.

> '. . . must look to the public declarations by States made for international purposes, and cannot resort to municipal legislative enactments . . . The fact that this was a public law which was available . . . to people who might have had the foresight and the facilities to examine it, is no answer. When a State deposits with an international organ a document . . . upon which other States are expected to rely, those States are entitled to accept that document at face value; they are not required to go back to the municipal law of that State for explanations of the . . . international instrument.'

Judge Hackworth's reasoning is equally applicable to the international validity of an instrument of ratification.[1]

(6) TERMINATION OF TREATIES—ACQUIRED RIGHTS

As has been seen (above, p. 262, n. 2), Lord McNair, in the first phase of the *Ambatielso* case, thought that a Declaration purporting to preserve the operative force of claims based on a treaty that was to lapse or determine was a work of supererogation that strictly had significance only *ex abundanti cautela*, since the lapse or termination of a treaty could not affect the validity of any claims otherwise good under it, and relating to the period when it was still in force; nor could such an effect be produced merely by the fact that (if such was the case) a new treaty was negotiated in place of the former one. He said (*I.C.J.*, 1952, p. 63):

> 'I do not see how the provisions of the Treaty of 1926 could prejudice claims "based" on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them. Neither the expiry of the Treaty of 1886, nor the entry into force of the Treaty of 1926, could affect the survival and validity of claims "based" on a breach of the Treaty of 1886 which had already occurred.'

This is really only a particular aspect of the general principles of (*a*) acquired rights, (*b*) executed (as contrasted with executory) clauses. It is an accepted rule of treaty law that the termination of a treaty, for whatever cause and in whatever way, can only affect its continuing obligations, and cannot *per se* affect or prejudice any right already definitively and finally acquired under it, or undo or reverse anything effected by any clause of an executed character in the treaty. Thus a payment made under the treaty does not become repayable; a settlement of a dispute effected by a treaty does not become re-opened because the treaty terminates or is denounced; demarcated frontiers are not rendered indeterminate; cessions of territory are not cancelled, &c.[1]

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[1] For a fuller discussion see the present writer's 'Do Treaties need Ratification' in this *Year Book*, 15 (1934), p. 113, section V, the conclusions reached in which, despite the lapse of some twenty-four years, he sees little reason to alter, although they might now be led up to by a somewhat different discussion. The question is considered in Sir Hersch Lauterpacht's *First Report* on the Law of Treaties (see p. 250, n. 4 above), pp. 67–82 and 157–72, and in his *Second Report* (A/CN.4/87 of 8 July 1954), pp. 15–23; and also, in part, in the present writer's *First Report* (see above, p. 254, n. 2) pp. 31–33, and 60–66, especially paragraphs 74 and 75 on pp. 65–66; and in the *Year Book of the International Law Commission* (1956), vol. ii, at pp. 113–14 and 122–24. It will be more directly and fully dealt with in his *Third Report* to appear in 1958.

(7) VALIDITY AND EFFECT OF AGREEMENTS IN DEROGATION OR VARIATION OF A TREATY, MADE BETWEEN A LIMITED NUMBER OF THE PARTIES THERETO

There was a passage in the opinion of the Court in the *Reservations* case which might be regarded as having a possible bearing on this question,[2] although it cannot have been the intention to raise it directly. It ran as follows (*I.C.J.*, 1951, p. 21):

> 'It is . . . a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention.'

This was said with direct reference to the question of the faculty to make unilateral reservations to a convention (as to that aspect of the passage see § 2, subsection (3) (*e*) (ii) below); and it is unlikely that the reference to 'particular agreements was intended to throw doubt on the *general* right of a limited number of parties to a convention to agree on some variant, or on some different régime, purely for application *inter se*, provided it is understood that this, being *re inter alios acta*, cannot prejudice the rights of the other parties to the convention to insist, so far as they are concerned, on the continued application of the conventional régime in respect of themselves, by which the parties of the new agreement will continue to be bound in relation to the convention States not parties to that agreement. Arrangements of this kind are in fact often entered into,[3] and work well enough when the rights and obligations under each instrument are severable from those of the other, and capable of separate application between different sets of parties. However, the Court was here dealing with a very different type of convention (the Genocide Convention), i.e. the normative type, not involving a reciprocal flow of rights and benefits *between* the parties *inter se*, but a set of absolute and self-existent obligations for each party individually, and independently of performance by any other State. To such a case, the passage quoted above from the opinion of the Court might well have a direct application if an attempt were made to vary the conventional obligations by

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[1] For a fuller discussion see the present writer's *Second Report on the Law of Treaties* (U.N. Document A/CN.4/107, of March 15th, 1957, pp. 61 and 151–2). A change or reversal is not produced automatically merely by reason of the termination of the treaty. It may in fact come about, but only by a further and independent juristic act, such as a provision in another treaty.

[2] For another aspect of the same question see subsection (4) (*c*) above.

[3] A conspicuous example is afforded by the so-called Congo Basin Treaties, the Convention of St. Germain of 1919 between some of the parties to the Berlin Act 1885, covering much of the same ground, and applying to the same area as the latter, but leaving the Berlin régime intact (*a*) between the St. Germain Powers and the Berlin Powers (other than any Berlin Power also a St. Germain Power); (*b*) between the remaining (non-St. Germain) Berlin Powers.

'particular agreements' arrived at by some only of the parties *inter se*. Thus if States A–Z agree by treaty not to charge one another's goods of a certain type an import duty of more than 6 per cent. *ad valorem*, there is nothing to prevent some of these States agreeing separately not to charge one another more than 4 per cent. (or agreeing that they will upgrade the charge, *inter se*, to 8 per cent.). Most-favoured-nation or non-discrimination clauses apart, States A–D and N–Z will have no cause for complaint so long as they continue not to be charged more than 6 per cent. by States E–M. On the other hand (to take the Genocide Convention—but the same principle would apply to many other norms created or confirmed by treaty), it is not possible both to commit and not to commit genocide, or having agreed not to, subsequently to agree with a particular country on a limited faculty to commit a certain amount of genocide. The obligation being absolute and comprehensive, an agreement between two or more of the parties to the Convention to tolerate *inter se* certain acts of genocide would (quite apart from the position regarding genocide under general international law) be null and voil as irreconcilable with the Genocide Convention, and without legal effect except in so far as it might preclude the particular parties to the agreement from complaining if those acts of genocide were in fact committed by any of them. This would, of course, be a particularly clear cut case. There might be others, less clear cut, to which the same principle would still apply. It is axiomatic that a subsequent treaty can only co-exist with an earlier treaty on the same subject matter in so far as the two are not in conflict, or the parties to both are identical (in which case the later will prevail in case of conflict).[1] The point is that the normative type of convention tends to be one in respect of which such a conflict either necessarily arises, or is highly likely to arise—so that unless the parties are identical, and the later instrument in fact amounts to an amending instrument, it will be invalid or ineffective.[2]

(8) STATUS OF SIGNATORIES TO A TREATY, NOT YET HAVING RATIFIED

For convenience, this is considered in § 2 below (Reservations), subsection (4) (*b*), especially under head (ii).

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[1] See on this the author's *Second Report on the Law of Treaties*, pp. 37 and 93 (above, p. 269, n. 1).

[2] Other and more difficult kinds of cases may be imagined: for instance, the majority of the parties to a treaty of peace may (so far as they are concerned) release the defeated party from certain restrictions imposed on it under the treaty. Such a 'release' can obviously have no effect juridically *vis-à-vis* parties to the treaty not agreeing to the release. Suppose the restriction to be one on the possession of certain kinds of arms: then it continues to be fully operative in respect of any 'non-releasing' party. The real effect of the 'release' would therefore appear to be simply to preclude the 'releasing' parties from complaining if the restriction is not adhered to—or to deprive them of the right of complaint. Since, in practice, such a release may well reduce the restriction to a dead letter, any parties not joining in it may well have valid cause for complaint, but, it would seem, on the political level, strictly, rather than on the juridical.

§ 2. Reservations

[*Note*: For various reasons,[1] this section, while based in the main on the *Reservations to the Genocide Convention* case, does not attempt to go into all the implications of that case, or except incidentally, into the merits of the criterion which the Court propounded for testing the validity of a reservation—namely, its compatibility with the objects and purposes of the convention. But the section attempts to elucidate the theory of reservations generally in the light of this case.]

(1) What is a reservation?

Neither the Court nor the dissenting Judges in the *Reservations* case attempted any definition of a reservation: but such a definition was given by Judge Zoričić in the first phase of the *Ambatielos* case as follows (*I.C.J.*, 1952, p. 76):

'A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning; . . .'

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[1] The main reasons are:

(i) The present writer has dealt with this matter fully elsewhere (see the article entitled 'Reservations to Mutilateral Conventions' in the *International and Comparative Law Quarterly* (January 1953).

(ii) The Court itself stressed (*I.C.J.*, 1951, p. 20) that 'the replies which the Court is called upon to give . . . are necessarily and strictly limited to that [i.e. the Genocide] Convention'. The matter had been referred to the Court by the United Nations Assembly, for an advisory opinion, and in making this statement as to the scope of its replies, the Court recalled the fact that 'the general question of reservations . . . both from the point of view of codification and from that of the progressive development of international law', had been referred by the Assembly to the International Law Commission. The Commission, however, which went into the matter shortly after the Court's opinion had been delivered, specifically considered that the criterion adopted by the Court for the Genocide Convention was unsuitable for general application (*Report of the International Law Commission for 1951*, U.N. Doc. A/1858, paragraph 24: 'The Commission believes that the criterion of the compatibility of a reservation with the objects and purposes of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general.').

(iii) The reason why the Commission thought this, as also one of the main reason for the dissent of the joint majority on the Court (Judges Guerrero, McNair, Read and Hsu Mo), was that, whatever its theoretical merits, the test would prove unworkable in practice (see the Commission's *Report*, loc. cit., and the views expressed by the minority Judges at pp. 44–46 of the report of the *Reservations* case; see also the present writer's article mentioned in (i) above, pp. 4–7, and nn. 7, 8, 12 and 14). One illustration will suffice. The Court found (*Report*, p. 26) that, from what it had held, 'it necessarily follows that each State objecting to it [sc. a unilateral reservation] will or will not on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention'. On this basis, the reserving State could simultaneously both be and not be a party to the Convention. What then, as the four-Judge minority asked (*Report*, pp. 45–46), would be the position in any case in which it became material to know objectively, precisely how may States were actually parties—suppose for instance that, as in the case of the Genocide Convention itself, twenty ratifications or accessions were necessary to bring the Convention into force, and the twentieth State ratified with a reservation which some of the existing parties were prepared to accept and some not—'what is the position, according to the new rule?', asked the four-Judge minority: 'In the view of some States the requirement of twenty ratifications or accessions would have been satisfied and the Convention would enter into force . . . In the view of others, the requirement would not be satisfied. Would the Convention be in force? And suppose later that it was judicially determined that the reservation . . . was not 'compatible with the object and purpose of the Convention', what would happen? Would the Convention cease to be in force from that moment? And would it be regarded *ab initio* as never having been in force? Such problems are bound to arise when the question whether a State is or is not a party remains in doubt. . . .'

Several points in this definition call for comment. The significance of the phrase 'agreed upon between the parties' will be considered later. The phrase 'with a view to restricting the application of one or more of its clauses' must be read as referring not to such a restriction for *all* the parties (or it would simply amount to an amendment to the treaty) but in favour of the party making the reservation. Similarly, the words 'or to clarifying their meaning' must be understood as referring not to a general agreed interpretation or clarification, but to a statement of how the reserving party proposes to interpret or apply the clause. Thus, a reservation might be said to be essentially a notice, statement, or declaration by which a party purports to confine its obligations under the treaty to something less than the full extent of them as therein written, or to interpret or apply them in a particular way. Both points are of importance, Governments often append to their signatures, ratifications or acceptances of a treaty, statements or declarations of a purely explanatory character, e.g. regarding the position or motives of the government in becoming a party; or which are of a political character, or of domestic import. These may loosely be termed 'reservations', but strictly are not, because, on examination, it appears that they leave unaffected the obligations of the treaty for the party concerned.[1] Similarly, governments not infrequently made declarations in which they do not say they will not carry out, or will only partly carry out, a certain provision—but make statements of intention, or say how they understand or propose to interpret or apply the provision, either generally or in certain events.[2] Whether this will amount strictly to an actual reservation or not, will depend on whether, by way of special interpretation, the party concerned is really purporting, so far as its own obligations are concerned, to alter the substantive content or application of the provision affected; or whether the statement is truly interpretational, and merely clarifies some obscurity, or makes explicit something that in the clause is only implicit. Thus the use of the *term* 'reservation' is not conclusive in either sense. A statement or declaration called a reservation may well prove not really to be one;[3] while a statement or declaration said to be merely clarificatory or interpretative, may well amount to, or be seen to involve, a true reservation.[1]

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[1] For instance, the United States might well attach to its signature of a treaty having territorial implications for the American continent, a reaffirmation of the Monro doctrine, without, however, in any way derogating from the actual obligations of the treaty, whatever these might be. Such a declaration would clearly have a purely political or psychological significance.

[2] Judge Levi Carneiro, in the *Ambatielos* case, referred to 'interpretative' declarations, and said (*I.C.J.*, 1952, pp. 52–53): 'Declarations of this sort are often made by one of the parties concerned to define the attitude adopted towards a given treaty, [or the] method of executing it.'

[3] Thus it is very usual for the United States Senate to attach a number of 'reservations' to its 'ratification' of a treaty; but often these do not actually affect (in the sense of purporting to detract from) United States obligations under the treaty.

(2) THE THEORY OF RESERVATIONS

The implications of the Court's general pronouncements require to be considered against the background of certain fundamental points respecting reservations, and in the light of the main current theories on the subject. It may be convenient to mention here that the central issue in the *Reservations* case, and the purport of the main question put to the Court, was whether a State accepting a general multilateral convention subject to a reservation could be regarded as a party to the convention if some of the parties objected to the reservation but others did not.

(*a*) *Bilateral and general multilateral treaties.* It is necessary to distinguish between these categories of treaties for the purpose of the problem of reservations. There can be no doubt that in the case of bilateral treaties—or of that class of plurilateral treaty, participation in which is confined to a very restricted number of countries—where the contractual, consensual and reciprocal element is paramount, consent is essential to the validity of a reservation. A unilateral reservation to such a treaty—particularly if it is a bilateral one—really amounts to a proposal to amend it, which must have the assent of the other party or parties. It is arguable that consent can be given tacitly, e.g. by silence or non-objection, and it may certainly often reasonably be deemed so to have been given if nothing is said (although in his *First Report on the Law of Treaties* (see above, p. 254, n. 2; p. 127 in the published version[2]), the present writer suggested that the contractual element is so strong in the case of this type of treaty that nothing short of an express consent would suffice to admit a reservation). The main point is that actual objection or notice of non-acceptance will always be fatal in these cases.[3] As regards general multilateral conventions, on the other hand, the position is much less clear cut (see subsection (*d*) below).[4]

(*b*) *The meaning of the term 'unilateral reservation'—Reservations made as of right and made 'unilaterally'—Distinction between unilateral reservations and a right of unilateral reservation.* There is an ambiguity in the use of the term ‘unilateral’. In the strict sense, all reservations, even those which it has been agreed in advance may be made (where such is the case), are unilateral, inasmuch as any particular reservation is only the act of, and privy to, the particular country making it, and only relates to its own obligations under the treaty. Even where several countries make substantially the same reservation, this remains technically the case. But although a reservation is always unilateral in this sense, the *making* of it may be covered by general agreement, when, for instance, the treaty specifically provides for a faculty to make reservations, or certain classes of reservations; or where, although the treaty is silent on the subject, the matter was discussed during the negotiations, and an understanding (express or tacit) was reached that reservations, or some reservations, or reservations by certain countries, would be admitted, or not objected to. In all such cases, the reservation may be said to be made as of right, under a faculty previously accorded. In all other cases, the reservation is unilateral, not only in form but in substance, and at that stage, is strictly only entitled by courtesy to be called a reservation, for in principle, until the reservation is admitted and accepted, expressly or *sub silentio*, it is only a *proposal* and not a completed and operative reservation.

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[1] Reservation in the guise of interpretation is in fact often employed as a technical device in those cases where it is known that an outright reservation would not be acceptable, but that an interpretational declaration, the occasion for having recourse to which may never actually arise, will be likely to be passed off *sub silentio.*

[2] *Year Book of the International Law Commission* (1956), vol. ii, p. 127, paragraph 97.

[3] The ensuing consequences would be that either the reservation must be withdrawn, or the country concerned cannot become a party. If it does become a party without a formal withdrawal, any attempt to apply the reservation would involve a breach of the treaty. Alternatively, the party must give notice of termination, or (if that is not possible under the treaty) seek agreed release from it.

[4] Yet it is precisely in the case of these conventions that the question really arises; for in the nature of the instrument, there hardly ever is a unilateral reservation to a bilateral treaty. Any special exemptions would be discussed by the parties in advance, and written into the treaty itself. The same, if not so absolutely, applies in the case of plurilateral treaties with restricted participation.

(iii) *Distinction between a completed* (*accepted*) *reservation and a proposal for a reservation.* The nature of this distinction has been made clear at the end of the previous subsection. The failure to draw it has been one of the chief causes for much of the current misapprehension about the extent and character of the right to enter reservations, where it exists. Basically, except where previous provision for reservations has been made in one form or another, there is no right to enter them, but only to propose them. Every intending party to a treaty has that right. Because the right has frequently been exercised; because the *modus operandi* often does not consist of asking permission first, but simply of entering the reservation and then awaiting reactions; because there often are no reactions except negative ones, i.e. the other parties, though they have knowledge of the reservation, fail to object to it, and can therefore be said, *sub silentio*, to have tacitly accepted it—the fact that the original right is only one of proposal, and that juridically the entering of the reservation is simply a proposal that requires completion by some form of acceptance—tends to become obscured. It then becomes easy to assume that there exists a unilateral right to make reservations, even if no faculty to do so is given in the treaty or during the negotiations. But this is not the case.

(*c*) *The distinction between the necessity for consent and the necessity for unanimous consent, in the case of multilateral instruments.* In theory at any rate (the practical results are usually highly unsatisfactory), a distinction can be drawn between the effect of a reservation as against a non-accepting party, and its effect on the possibility or otherwise of the participation of the reserving State in the treaty notwithstanding non-acceptance of its reservation. This distinction obviously cannot be drawn in the case of bilateral treaties; for there, if the reservation is not accepted by the other party, the reserving State cannot become a party unless it withdraws the reservation. It seems probable that a similar position must obtain in the case of plurilateral treaties with restricted participation. In the case of general multilateral instruments, however, where a reservation may meet with a mixture of acceptance and non-acceptance, a situation can be envisaged in which the reserving State would become a party with the benefit of its reservation *vis-à-vis* the accepting parties (which, however, would be entitled to apply the reservation back in respect of the reserving party), but on the basis that the reservation, or else the whole convention (if the reserving party did not give way), would not be in force between the reserving party and the non-accepting parties. Some of the consequences of these possibilities are considered below.

(*d*) *The régime of general multilateral conventions—Three theories*. Ignoring certain subdivisions, there seem to be three main theories as to the position occupied by consent in respect of reservations made unilaterally to a general multilateral convention. They might be called the theory of absolute sovereign right, the necessity for unanimous consent theory, and the theory of limited or conditional right.[1]

(i) *The 'sovereignty' theory*. This theory postulates, as being inherent in State sovereignty, that any State to which it is open to participate in a general multilateral convention has a right, in so doing, to make such reservations as it pleases, directed, from its own domestic or general political standpoint, to facilitating or making possible its participation.[2] This theory will obviously not hold water juridically. The very right to participate at all depends on what has been agreed in that respect in framing the treaty, and the right clearly relates to the treaty as drafted, and not to what would, in effect, be a different instrument as modified by reservations. What sovereignty does confer is a right of *non*-participation—no State can be obliged to come in without its consent; but equally, no State can come in on terms that oblige others (without their consent) to accept, in respect of that State, a different convention from the one agreed—at the least, a right of objection on the part of the other parties must exist which, if exercised, will have certain consequences (see below, *passim*).

(ii) *The 'unanimity' theory*. This theory, or view, regards the régime of the general multilateral convention as being automatically subject to the traditional rule of consent, as it applies to the case of bilateral and restricted plurilateral treaties: the consent of *all* the parties must, in one form or another, be obtained, or at least there must not be actual objection from any. Of the theoretical correctness of this position there can be no doubt. The practical difficulty involved is that it may confer a virtual veto on a single State or small group, although the great majority have no objection to the reservation and would be prepared to accept it. This might result in keeping out a country whose participation would be valuable even on a reduced basis, so to speak.[1] The element of consent cannot be dispensed with, but, recognizing that the general multilateral convention of the humanitarian or sociological type is largely a new phenomenon—a phenomenon that scarcely exists under domestic law; that many of these conventions, though based on consent as to the manner of their conclusion, have markedly non-contractual elements as to their substance, and are not 'reciprocal' in their mode of application;[2] whereas the unanimous consent rule is drawn largely from private law conceptions of contract—it is certainly arguable that there should be some mitigation, which might, for instance, permit of participation even with a reservation, provided the latter had been accepted, or not objected to, by the great majority of the other States concerned.[3]

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[1] For a fuller analysis of these theories see the present writer's article mentioned in n. 1(i), p. 272, above, p. 9 et seq.

[2] This theory was principally advanced in the United Nations General Assembly discussions on Reservations in 1950 and 1951 by Soviet group countries.

(iii) *The 'limited' or 'conditional' theory.* There are two forms of this, according to whether a limitation is postulated for the *type* of reservation that can validly be made, or whether the reservation, whatever its nature, is deemed to be conditioned as to the scope of its *effect*, or perhaps more accurately by the effect attributed to any objection taken to it. The limitational aspect of the theory tries to find some objective criterion wherewith to test the admissibility of any reservation: thus unilateral reservations are said to be admissible in respect of formal or procedural, but not in respect of substantive clauses; in respect of unimportant, but not in respect of important matters; if compatible with the objects and purposes of the convention, but not otherwise (the criterion adopted by the Court in the *Genocide* case), &c. The difficulty is that none of these criteria is in fact objective: all depend on a subjective appreciation of what is procedural or substantive, important or unimportant, compatible or incompatible; and, as this appreciation may, and certainly will vary from party to party, the type of difficulty described in n. 1 (iii), p. 272, above, will inevitably arise. At this point, the 'conditional' aspect of the theory becomes predominant. Let reservations be made, more or less at will; but their effect will be conditioned by the principle that no reservation can be imposed on another party against its will. Therefore the reservation will be ineffective as against an objecting party. On the other hand, if a party does not object, the reservation will be good as against it. In short, the reserving country will always become a party to the convention, but its rights and obligations in respect of each of the other parties, and theirs in respect of the reserving party, will vary according to whether they do or do not admit the reservation (or else, under another form of the theory, the convention will be in force as between the reserving State and non-objecting parties, but not as between it and objecting ones).[1] It is clear that, while this system might work in the case of that type of general multilateral convention (e.g. on tariffs and trade) which involves reciprocal rights and obligations for the parties *inter se* (and therefore direct benefits which one specific party can refuse to another specific party under, or in consequence of, a reservation), it is virtually meaningless in the field of the 'normative' convention, and tantamount to allowing an unrestricted right of reservation—since the objection has nothing on which it can 'bite' or operate. The objecting country still has itself to carry out the convention in full: the question of refusing its benefits in whole or in part to the reserving State cannot arise, or does not normally do so, since that is not the *modus operandi* of these conventions.[2] On the other hand, the reserving State can simply apply its reservation—i.e. do less than the convention requires it to do—and, except in those comparatively rare cases where it is possible to compel adjudication, no objecting country would have any means of making its objection good, or of taking any effective action in consequence of it.

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[1] This attitude applies particularly to the case of 'normative' (law-making, sociological, humanitarian) conventions, the parties to which do not so much acquire rights and enjoy reciprocal benefits, as undertake to carry out obligations and observe certain standards of behaviour. Half a loaf may be better than no bread.

[2] i.e. in the case of the 'normative' conventions referred to in the immediately preceding footnote, which do not involve obligations moving between the parties *inter se* on a basis of reciprocity, but, in effect, obligations assumed *erga omnes* on an absolute and self-existent basis.

[3] Various schemes have been suggested for this purpose—see in particular, in their chronological order, those in the present writer's article referred to in n. 1 (i), p. 272, above, pp. 23–26; in Sir H. Lauterpacht's *First Report* (p. 250, n. 4, above), pp. 101–20; and in the present writer's *First Report* (p. 254, n. 2, above), *Year Book of the International Law Commission* (1956), vol. ii, pp. 115 and 126–7.

(iv) *Conclusion.* All the above theories and systems must, so far as general multilateral conventions are concerned,[3] be pronounced in greater or lesser degree unsatisfactory. The least unsatisfactory is the unanimity one, and in his *First Report*,[1] the author has proposed a system which would preserve that requirement, though under conditions which, it is believed, would ensure that (deliberate malice apart) no reasonable and properly motivated reservation would be likely to fail to secure general acceptance, or at any rate non-objection. It is now time to consider the actual or apparent attitude of the Court on some of these matters.

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[1] This system is sometimes known as the Pan-American system, because of its supposed application among the States of the Pan-American Union; but there is reason to believe that even in that field its application has been limited and unsatisfactory—see the present writer's article referred to in n. 1(i), p. 272, above, pp. 20–22.

[2] For instance, if a State, in becoming a party to a human rights convention, enters a reservation in respect of a clause forbidding the use of forced labour, to the effect that in view of the undeveloped condition of its communications it will have to employ forced labour for roadmaking, there is nothing that any objecting parties can do. It is too late for them to enter a corresponding reservation, even if this were desirable or served any purpose. They equally cannot suddenly start subjecting citizens of the reserving State in their territories to forced labour. Consequently the notional position that, as they object to the reservation, the Convention is not in force between them and the reserving State, or that State is not (for them) a party, is entirely illusory.

[3] The unanimity rule is of course quite satisfactory, indeed essential, for bilateral and other restricted treaties.

(3) THE GENERAL ATTITUDE OF THE COURT ON RESERVATIONS TO MULTILATERAL CONVENTIONS

(*a*) *The Court and the sovereignty theory.* The Court, in the *Reservations* case, rejected outright the view that there was any absolute or unrestricted right to make and maintain reservations (*I.C.J.*, 1951, p. 24):

> 'It has nevertheless been argued that any State entitled to become a party to the . . . Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.'

(*b*) *The possibility generally of making reservations.* It is obvious that if the convention excludes in terms the possibility of making reservations, none may be made. If it provides for them in terms, the position is equally clear. More difficult are the cases where, although the convention does not in terms exclude the possibility, there is, or may be, a strong inference arising from its general character that reservations are not admissible[2]; or where the convention is simply silent, and neither the terms nor the character of the treaty speak clearly. In the last case at any rate, the traditional view would be that there was no general faculty to reserve, but that unilateral proposals for reservations would be admissible if generally consented to. The Court held that the absence of a specific reservations clause in the convention did not necessarily preclude the possibility of reservations. After adverting (*Report*, p. 21) to the present day 'More general resort to reservations[3]'; the 'very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations';[4] and also to the fact that multilateral conventions were, as regards their framing, often 'the result of a series of majority votes', and that the 'majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations'[1]—an observation 'confirmed by the great number of reservations made of recent years to multilateral conventions'[2]—the Court continued (*I.C.J.*, 1951, p. 22):

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[1] pp. 115 and 126–7; see subsection 2 (*a*) above and p. 274, n. 4.

[2] In the case of what might be called the 'humanitarian' type of convention, this inference would be very strong.

[3] This seems to beg the question whether such resort was (*a*) desirable generally, (*b*) necessarily and always valid in the specific case.

[4] Again, somewhat question-begging.

> 'In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain[3] reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations.[4] The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.'[5]

Apart from certain considerations of detail, commented on in the footnotes hereto, the broad effect of this passage seems to be, briefly, that no presumption against the existence of a faculty to make reservations arises merely from the absence of a reservations article in the convention, although it does not follow that any particular reservation will be valid, or (even if valid *in se*) effective *erga omnes*. Thus, the Court may not in this passage have gone much beyond the traditional view, which admitted that, despite a silence in the convention, the parties might have agreed in the course of its conclusion that certain specific reservations could be made; or that the parties might have reached an understanding that certain classes of reservations would not be objected to. Nevertheless, on its actual wording, this pronouncement by the Court seems to go very near to endorsing a studied process of reading into general multilateral conventions an implied faculty of making reservations. It must therefore be related to the fact that, in the case of the Genocide Convention, the Court did actually consider that some such understanding had been arrived at, despite even the positive decision not to include a specific reservations clause.[1] But for this, it seems doubtful whether, having regard to the character of the Genocide Convention, the Court would so easily have read such a faculty into it, or expressed itself in such comparatively wide terms as to the general circumstances in which such a faculty could be presumed to exist. On the facts, the Court said (loc. cit., p. 22):

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[1] This idea, unless heavily qualified, would lead to the odd position that a clause carried by a majority could be nullified (as regards its application to the minority) by means of individual reservations to that clause introduced by each member of that minority on signature or ratification. This observation of the Court's must probably be read as qualified by its compatibility criterion, and also by the consideration mentioned by the Court later, that a State should not be excluded merely because of a minor reservation.

[2] It seems probable that the Court here had in mind the article by the late Sir William Malkin, formerly Legal Adviser to the Foreign Office, in this *Year Book*, 7 (1926), p.141, entitled 'Reservations to Multilateral Conventions', in which the reservations made to some eighteen multilateral conventions were examined. The Court did not, however, advert to Sir William's conclusion (p. 159) that 'of all the cases examined . . . there is hardly one as to which it cannot be shown that the consent of the other contracting Powers was given either expressly or by implication'. This passage was cited before the Court—see its published volume of *Pleadings, Oral Arguments and Documents in the Case*, p. 401.

[3] Not any reservation therefore. The Court was here leading up to its compatibility criterion.

[4] That could certainly be the explanation. But where it was, would that not lead to the conclusion that no reservations were permissible, at least unless unanimously agreed to?—and if a reservations article had actually been proposed or its possibility discussed, but rejected (as happened in the case of the Genocide Convention), would not that inference be irresistible?

[5] The Court here separated the question of the possibility of making any reservation at all from that of the validity and effect of specific reservations, if possible to be made, and in fact made.

> 'Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated[2] at successive stages of the drafting of the Convention.'

Then, after referring to certain statements made during the preparatory work, the Court proceeded (ibid.):

> 'The Court recognizes [sc. considers] that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention[3] and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.'

From this it seems permissible to conclude that, but for the view taken as to the existence of a prior understanding to admit reservations, it would not have been easy to read into the situation an implied right to make them. Indeed, the deliberate refusal to include a reservations *article* might have led to the conclusion that, in principle, reservations were excluded. In that event, it would have been clear that any reservation proposed would need unanimous consent, and that if objected to, the reserving State could not become a party (unless the reservation were withdrawn).

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[1] Whether this view was justified or not (see nn. 2 and 3 below) is immaterial for present purposes.

[2] The term 'contemplated' is ambiguous. The matter was *discussed*, but that is not the same thing.

[3] The author, who took part in the drawing up of the Genocide Conventoin as United Kingdom representative on the Sixth Committee of the United Nations Assembly, in which the work was done, can recollect no such understanding. Certain delegates did indeed state that their Governments would, or might, enter certain reservations on signature or ratification, but there was no general understanding that this could be done *as of right*, and the idea that it could be was directly negatived by the Sixth Committee's *Rapporteur*, M. Spiropoulos (Greece), who stated quite categorically (*Official Record* of the 3rd Session of the General Assembly, 1948, Part I, Sixth Committee, p. 711) that: 'The statements made . . . would be included in the record . . . but they had no legal significance. He wondered whether certain delegations had fully realized the implications of the reservations they had made. Those reservations could be made at the time of the signature of the convention. However, if a Government made reservations regarding a convention, it could not be considered as a party . . . unless the other contracting parties accepted those reservations expressly or tacitly.'

No one contradicted M. Spiropoulos, and the Chairman (Mr. Alfaro, of Panama), summing up, concluded that 'there was no necessity to open a discussion on the legal implications of the reservations that had been made'. From this, the present writer at all events, drew the conclusion that although some reservations in the sense adumbrated by certain delegates might eventually be formally *proposed* by Governments, on signature or ratification, they would all need unanimous consent in order to be effective. He cannot therefore but agree with the conclusion come to in the four-Judge minority opinion in the *Reservations* case (Judges Guerrero, McNair, Read and Hsu Mo—*Report*, p. 41): 'We do not find it possible to infer from the manner in which the question of reservations was dealt with throughout the preparatory work that there was any agreement to confer upon States . . . any right to make reservations which would not be dealt with in accordance with . . . normal law and practice . . .' [by which they meant—see below under head (*d*)—on a basis of the necessity for unanimous consent].

(*c*) *The Court and the general question of consent.* The Court admitted the principle of consent in the sense that no party to a convention could be bound by a reservation to which it had not consented.[1] The Court did not, however, in the application of this principle, look beyond the relations between the reserving State and the objecting State (with consequences that will be discussed later). This would have sufficed, but for the fact that the Genocide Convention (and the same is broadly true of a great many of the conventions concluded under United Nations auspices) was of a type that did not imply or involve any 'relations' between the contracting parties—a fact which the Court seems to have realized (see below, subsection (3) (*e*) (iii)), but from which it does not seem to have drawn the conclusion that, in such cases, the principle of consent must be given a different and a wider application if it is to remain significant and effective. The Court's position on the general question of consent was stated as follows (loc. cit., p. 21):

> 'It is well established that in its treaty relations[2] a State cannot be bound without its consent, and that consequently no reservation can be effective against[3] any State without its agreement thereto.'

And again (p. 26).

> ' . . . no State can be bound[4] by a reservation to which it has not consented.

(*d*) *The Court and the unanimity principle—the integrity of the convention* versus *the universality of its application.* The Court did not think that, in the case of conventions such as the Genocide Convention, the requirement of unanimous consent for reservations could be integrally applied. (This must, however, be related to the Court's view that only such reservations were valid at all as were compatible with the objects and purposes of the convention.) Linked with this question, and indeed implicit in it, is the issue of the integrity of the convention *versus* its universality: is it more important to keep the application of the convention intact and without any derogations—even if, on that account, some States do not become parties to it, and are not therefore bound to apply it, as such,[1] at all?—or is it more important to secure the widest possible participation, and, to that end, allow some faculty of reservation—even if the result is a measure of derogation from the full régime of the convention? In this second sense, the convention is viewed, not as a contract, but as a sort of law, which a man may be permitted not to observe in part if he will but observe the rest. The case is a little like that of a man whose membership of a club is so much desired that the existing members are ready to let him join without requiring him to conform to all the rules. The question is one which can perhaps not unreasonably be answered in this second sense, as the Court did (though even so the answer has its dangers[2]), provided the permissible limit of reservations is well defined,[3] and also that there is some method of preventing it from being overstepped.[3] Otherwise, this question cannot but open the door to serious derogations, which even the aim of including as many States as possible can hardly render acceptable. On the question of unanimous consent to reservations, the Court, after referring (loc. cit., p. 21) to 'the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations',[4] went on in a later passage to say (ibid., p. 24):

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[1] Consent can of course be given either *generally*, by the inclusion of a reservations article in the convention or by an understanding reached in the course of its conclusion; or *ad hoc*, by consenting, or not objecting to, a specific reservation when proposed.

[2] There is the same confusion here. The Genocide Convention involved obligations *for* all the parties, but not relations between them *inter se*.

[3] The same point. Although each party had a right to require the application of the Convention by every other, it was not against, or in favour of one another, that the parties applied it.

[4] The same point again, in effect. Not being bound by a reservation is a sterile position unless the convention is of such a kind that rights under it can effectively be refused to the reserving State if it purports to apply its reservation. Where the convention only involves obligations for the parties, and not reciprocal rights or benefits moving *inter se*, this will be impossible.

> '. . . it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose[5] and mode of adoption, it can be established that the parties

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[1] They may of course, under general law (as in the case of genocide), be under an obligation to refrain from certain practices in any event—but not perhaps to take any specific *steps* for their suppression or avoidance.

[2] See pp. 16–20 of the author's article referred to in n. 1(i), p. 272, above.

[3] It is especially in these respects that the Court's system appears unsatisfactory. The compatibility criterion is fundamentally subjective and uncertain, as the jointly dissenting Judges showed (*Report*, pp. 43–45). As regards sanctions, the Court's system renders all these actually or potentially illusory. Three possible sanctions may be envisaged: (i) that the reserving State is not regarded as a party to the convention: but the Court's system would allow the reserving State to become a party, however drastic its reservation, if it could but find only *one* other party ready to accept the reservation—or even to pass it over *sub silentio*; (ii) that it should be possible for the other parties to withhold from the reserving State the same benefits as are excluded by its reservation: but in the genocide type convention there are no benefits, only obligations; (iii) that the validity of the reservation can be tested by compulsory arbitration or adjudication under the convention itself, or otherwise. The irony of the situation in the case of the Genocide Convention was that it was precisely to the article providing for a reference of all disputes to the Court that a number of reservations had been entered. The Court's view (p. 27) that this article could be used for testing the validity of the reservations was consequently challenged by the four-Judge minority (p. 45) in so far as these particular reservations were concerned. One or two very fine points of law arise as to this, but cannot be discussed here.

[4] This last phrase has implications not easy to reconcile with the Court's view as to the effect of the preparatory work in the case of the Genocide Convention (see pp. 280–2 above).

[5] The intrinsic character and purpose of the Genocide Convention would normally have led

intended to derogate from that rule by admitting the faculty to make reservations thereto.

'It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law.'[1]

It again appears from the concluding phrase of the first paragraph of this passage what importance the Court attached to (and to what a great extent its whole decision in the *Reservations* case hinged on) the finding that a tacit agreement or understanding on the part of those who concluded the convention to admit a faculty of entering reservations must be implied. However, the Court also found (p. 23), following on a review of the history of the Genocide Convention, that it 'was . . . intended by the General Assembly and by the contracting parties to be definitely universal in scope'. On this basis, therefore, a faculty of reservations could be admitted, provided it was limited to making such reservations as were not incompatible with the objects and purposes of the Convention. The Court's basic view was that it was necessary to find a way of meeting the presumed desire of the parties, both to encourage as much participation as possible, but also not to sacrifice any of the essential objects of the Convention. This view was expressed in the following passage (loc. cit., p. 24):

'The object and purpose of the Genocide Convention imply that it was the intention . . . that as many States as possible should participate. The complete exclusion . . . of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.'

This was not an unreasonable view to take in respect of a convention of such an unusual character as the Genocide Convention (even if—see below—the jointly dissenting Judges found equally cogent reasons for coming to a different conclusion); and the fact that, in order to meet the double requirement entailed by this view, the Court proposed a criterion which has been criticized as unsuitable for general application, or as unworkable in practice (see p. 272, n. 1 (ii), above), does not prejudice that view itself—especially as other ways of meeting the situation exist that are less open to criticism. Nevertheless, the jointly dissenting Judges expressed a different opinion. As has been seen (above, p. 281, n. 3), these Judges did not share the view that a right to make reservations had been admitted during the

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to the conclusion that *no* derogations could be permitted. But since the Court found (see further on) that the Convention was intended to have universal scope, it inferred the existence of an intention to allow a limited right of derogation in order to make this possible.

[1] Hardly the point.

drawing up of the Convention; and after a full review of the precedents and authorities (which the Court did not refer to at all), they summed up on the question of unanimity of consent, and as to the position generally, to the effect that they were of the opinion (loc. cit., pp. 41–42):

> '(*a*) that the existing rule of international law, and the current practice of the United Nations, are to the effect that, without the consent of all the parties, a reservation proposed in relation to a multilateral convention cannot become effective and the reserving state cannot become a party thereto;
>
> (*b*) that the States negotiating a convention are free to modify both the rule and the practice by making the necessary express provision in the convention, and frequently do so;
>
> (*c*) that the States negotiating the Genocide Convention did not do so;
>
> (*d*) that therefore they contracted on the basis that the existing law and the current practice would apply in the usual way to any reservations that might be proposed.'

Equally, the jointly dissenting Judges put the integrity of the Convention before its universality (pp. 46–47):

> 'We believe that the integrity of the terms of the Convention is of greater importance than mere universality in its acceptance. While it is undoubtedly true that the representatives of the governments, in drafting and adopting the Genocide Convention, wished to see as many States become parties to it as possible, it was certainly not their intention to achieve universality at any price. There is no evidence to show that they desired to secure wide acceptance . . . even at the expense of the integrity or uniformity of its terms, irrespective of the wishes of those States which have accepted all the obligations under it. . . .
>
> ' . . . So, when a common effort is made to promote a great humanitarian object, as in the case of the Genocide Convention . . . [it] is . . . not universality . . . that forms the first consideration. It is rather the acceptance of common obligations—keeping step with like-minded States—in order to attain a high objective for all humanity that is of paramount importance.'

Applying this to the unanimity issue, the joint minority continued (p. 47):

> 'Such being the case, the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude than ever the existing rule which requires the consent of all parties to any reservation . . . In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of . . . States which have irrevocably and unconditionally accepted all the obligations of the Convention.'[1]

(*e*) *The Court and the theory of a limited or conditional right of reservations.* It has been seen, in respect of the Genocide Convention, that the Court gave effect to this theory in both its aspects (as to which see pp. 277–8 above). Some further and more specific observations are, however, called for.

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[1] The jointly dissenting Judges here recognized the lack of equity in a position according to which some of the parties to a convention are bound to carry it out in full, while others do so only subject to what may be important derogations, while still enjoying all the *kudos* of participation, and suffering no penalties by way of the denial to them of any benefits.

(i) *The limitational aspect, or limitation as to the character of the reservation.* The Court held in effect that the validity of a reservation could be tested by its intrinsic character. The particular criterion suggested for the purpose, namely, the compatibility or otherwise of the reservation with the objects and purposes of the convention, need not be further discussed here.[1] The difficulties attaching to it, of uncertainty, subjectivity and unworkability arising from the different opinions as to any particular reservation likely to be formed by different States, apply almost equally strongly, if not more so, to all the other possible criteria that profess to test a reservation according to its intrinsic character[2]—thus leading to the conclusion that some more objective test is required: for instance (if the most objective test of all—unanimous acceptance or non-objection—is thought to be too rigid) acceptance or non-objection on the part of some pre-determined and appropriate majority.

(ii) *The value and importance of the principle, resulting from the Court's view that there is always some limit to the right of reservation.* The real value, it is suggested, on a general basis, of the Court's finding, is that it indicates clearly (*a*) that the right of reservation, even where it exists, is never an unlimited one;[3] (*b*) the nature of one important element, amongst others, that the parties should bear in mind in deciding whether to object to a given reservation or not.[4] The Court specifically stated (loc. cit., p. 21) that 'none of the contracting parties' to a multilateral convention were 'entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention'. Moreover, the Court itself recognized the difficulties arising from the fact that, under the system it favoured, different views as to the quality of a reservation would result in the reserving State both being, and not being, regarded as a party to the convention—(p. 26; 'The disadvantages which result from this possible divergence of views . . . are real'); but the Court thought these disadvantages could be mitigated by (loc. cit., 26)

> '. . . the common duty of the contracting States to be guided in this judgment by the compatibility of the reservation with the object and purpose of the Convention.'

Provided the judgment of the State in this sense is regarded as contributing (or not) to a majority view which will be determinant, and not as directly governing the relations between the State concerned and the reserving State, this criterion is a perfectly sound one, and, if not necessarily the only one that the State might be entitled to apply (for the issue is partly one of policy), would certainly be one which every State was under a duty to take account of.

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[1] See p. 271, n. 1, and p. 283, nn. 2 and 3, above.

[2] See subsection (2) (*c*) (iii) above.

[3] Even where a right of reservation is conferred by the convention itself, or agreed by the parties, it is usually confined to certain articles. In those comparatively rare cases where a convention appears to confer an unrestricted right of reservation, it is probable that certain limits could be inferred from the character of the negotiations. However, this case would in any event constitute the only possible exception to the principle clearly underlying the Court's finding, namely, that some limitation on the right of reservation must always be implied.

[4] Even on the basis of a majority rule, such a decision still has to be made. The difference is that the final *result* is certain and unitary, depending on a fixed majority view; whereas, under the Court's system, the result would vary according to each individual view taken, and would usually result in a duality of attitude.

(iii) *The conditional aspect* (*or limitation as to the effect of the objection*). The more serious aspect of the system propounded by the Court is not the criterion adopted, which, if properly understood and applied, has a legitimate sphere of operation—but the *effect* given to an objection based on the application of this criterion. According to this system, the reservation is conditioned, not by the effect it does, or may, have upon the participation of the reserving State in the convention (i.e. the question whether it can become a party at all), but by its effect on the situation *as between* the reserving State and the objecting or non-objecting State, as the case may be. In the result, unless a reservation meets with *unanimous objection*,[1] the State making it will always be able to become a party to the convention—that is to say, have that status. The only question will be, whether the reserving State will be deemed not to be a party by (or in respect of) the objecting State; or whether, *per contra*, it will be deemed to be a party, except as regards the clauses affected by the reservation. The latter, however, is evidently nothing but an empty form of words wherever the clauses concerned do not operate reciprocally between the parties *inter se*. In such cases no effect of any kind is produced by the convention being in force between two countries 'except' as regards certain clauses: it is simply another way of saying that the reservation is effective even against an objecting party.[2] As regards the former position, there are first the practical difficulties arising from the duality it creates—(i.e. the reserving State both is and is not a party: therefore, what happens when it is necessary to determine whether that State objectively and absolutely is or is not a party—for instance for the purpose of the number needed to bring the convention into force, or for the constitution of some majority required under the convention, e.g. for the adoption of any amendment?) But secondly, this position leads to the 'Gilbertian' result that, in any conceivable circumstances, and on the basis of any conceivable set of reservations, a reserving State, in order to acquire the status of a party, has only to find *one* State willing not to voice an actual objection to its reservations. In theory, two States could both enter similar reservations derogating from half the convention or more, and by arranging to 'accept' each other's reservations, mutually confer upon themselves the status of parties. That these consequences are theoretically possible will be apparent at once to anyone who examines carefully the implications of the Court's system as stated by it in the following passage (loc. cit., 26):

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[1] Under the present-day systems of State blocs or groups, this possibility can virtually be ruled out: a State will always find at least one other State sufficiently well disposed not to voice an actual objection, and this of course would, under this system, suffice to confer the status of party.

[2] No doubt, on the basis of this system, a reservation would equally be effective against an objecting Party as regards a clause in a reciprocal *inter se* type of convention; but in that case the objecting party could withhold the benefits of the clause from the reserving State, thus both restoring the balance and exercising a sanction. With the non-reciprocal type of clause, there would be neither.

> 'As has been pointed out, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint . . . it necessarily follows that each State objecting . . . will or will not, on the basis of its individual appraisal . . . consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship[1] between the State making the reservation and the objecting State; on the other hand, as will be pointed out later, such a decision might aim at . . . complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane' [see footnote below on the meaning of this[2]].

Further on (ibid., p. 27) the Court added:

> '. . . it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

It is clear that in practice such a system was tantamount to allowing what the Court had purported categorically to reject (see above, subsections (3) (*a*) and (*e*) (ii)), namely, an unrestricted right to make unilateral reservations;[3] for in the absence of any objective determination of validity—which will normally only be possible in those cases where reference to a tribunal can be compelled—there would be nothing to prevent a State making any reservation, however incompatible or otherwise invalid, and nevertheless ranking as a party, provided at least one other party accepted or did not object to the reservation. Moreover, according to this system, it would seem that, in theory, even if most of the remaining parties refused to regard the reserving State as a party, it would not only have that status, but might have a good claim to rank as such for the constitution of any majority required under the convention, e.g. for the adoption of amendments to it, for the taking of certain decisions, &c. Furthermore, as has been seen, most of the sanctions which, in the case of the reciprocally functioning and non-normative type of convention, will usually operate, either to cause the reservation not to be made at all, or to equalize its effects if it is, are rendered illusory.[1] Yet it is clear that the Court was fully aware that the Genocide Convention was of the normative type, and did not operate reciprocally by way of any benefits moving between the parties *inter se* on which an objection to a reservation, or some form of counter-action, could 'bite'. Describing the Convention the Court said (p. 23):

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[1] Again the same misconception—there is no true conventional, i.e. reciprocal, relationship in this type of case.

[2] By this rather obscure passage the Court meant (see the second paragraph on p. 27 of the *Report*) that an objecting State might seek to obtain an objective finding of incompatibility from an international tribunal, and on that basis to have the reserving State declared a non-party in all senses, and for all concerned.

[3] This had of course been pointed out to the Court in argument (see the Court's published volume of *Pleadings, Oral Arguments and Documents in the Reservations Case*; argument of Sir Hartley Shawcross, p. 387).

> 'The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. *Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties*'—[author's italics].

But if so (see passage italicized), what meaning and effect can be attributed in the context of this type of convention to those other passages, quoted earlier, in which reference was made, e.g. to reservations not being effective 'against' a State without its consent; to an objection only affecting the 'relationship' between objecting and reserving State; to the convention entering or not entering into force 'between' the States concerned, or the clauses affected by the reservations not having effect between those States; or even to the finding that the objecting State need not regard the reserving State as a party. The Court naturally included the passage just quoted (and it is perfectly correct as a description of this type of convention) in order to explain and justify its view (equally correct) that an unlimited right of reservation could not be admitted. The Court does not, however, seem to have taken the further step of drawing the conclusion that in order to prevent this, it is not sufficient merely to have regard to the intrinsic character of the reservation itself: it is also necessary to attribute a sufficient effect to any objection that may be made to it. Briefly, nothing short of total exclusion from the convention will suffice, although in order to avoid this happening as the result of some merely frivolous objection to a minor reservation, exclusion could be confined to cases where the reservation is not accepted even by the appropriate majority fixed for the purpose.[2]

[1] It may be contended that such an extreme situation is unlikely to occur in practice. That may be so, although something not far off it is well within the bounds of possibility. In any case the touchstone of a theory is always how it stands up to the extreme case. The mere fact that the situation described above exists as a theoretical possibility is enough to indicate a serious flaw in the doctrine that can give rise to it.

[2] Admittedly this system might result in the objections of the minority being overruled, and the consequent admission of the reserving State as a party. But since, in this type of convention, such a result would neither add to nor subtract from the substantive obligations of the minority in any way at all, it seems the smaller evil, amply compensated for by the solidity of the reserving State's position as a party supported by the large majority.

(iv) *Conclusion.* The problem is a difficult one and no solution is ideal. The finding of the Court tended in the right direction, but did not go far enough. Alternatively it took a turn that reintroduced at another level a possibility that the Court had clearly intended to avoid. The case of participation in this type of convention is basically similar to that of a man who wishes to join a club, but enters a caveat that he does not propose to be bound by some rule, e.g. the one that prohibits members from taking books from the club library home. Clearly he would not be allowed to join. But on the analogy of the system applied in the *Reservations* case, he could do so if only two or three members accepted his 'reservation'. If the others complained to the club secretary or committee, they would be told that as some members were prepared to have him he must be admitted, but that, although he must be allowed to enjoy all the *kudos* and amenities of membership, the complaining members need not regard him as a member and, in their relations with him, could treat him as a non-member. They would find that this meant nothing at all except the privilege of ignoring him when on the premises. As regards the new member's intention of taking the library books home, the complaining members would be told that this 'reservation' was 'ineffective' in their 'relations' with him, since they could not be 'bound' without their consent. They would find that this too meant nothing. It would in itself neither oblige the new member to observe the rule, nor free the others from their own obligation to do so. If it is necessary to conclude that this would constitute an absurd result, it will follow that any system that can lead to such a result must be pronounced unacceptable.

(4) MISCELLANEOUS POINTS ON RESERVATIONS

(*a*) *Tacit acceptance of reservations.* The Court referred (p. 21) to the 'very great allowance made for tacit assent to reservations', and again (p. 24) to the 'considerable part which tacit assent has always played in estimating the effect which is to be given to reservations . . .'. There can be little doubt that, in the present state of international practice, and provided the reservation has been brought to the official attention of each of the other States concerned—either directly by the reserving State itself, or by the 'headquarters' government,[1] or by the Secretary-General of any international Organization under the auspices of which the convention was concluded—acceptance must be deemed to result from non-objection, from tacit assent conveyed *sub silentio.* It has not been sufficiently appreciated how very greatly the process of making and validating unilateral reservations has been facilitated by the admission of this process.[1] If its implications were more fully understood, it would be seen that it virtually renders any special system governing the right to make unilateral reservations unnecessary—and, indeed, goes a long way in itself to facilitate, and even promote, the practice of making them. A government *asked* to give its consent will often refuse it, where it will hesitate to initiate and volunteer a positive objection. Equally, a system which requires positive assent enables governments automatically, and without taking any definite step, to reject any reservation they do not positively welcome; whereas the opposite system will involve that many Governments will in fact accept *sub silentio* reservations they do not really care for, and would have rejected if they had not been placed under the necessity of offering specific objection. In consequence, only obviously inadmissible reservations are likely to be rejected. The mere fact that objection has been taken tends to suggest of itself a probable intrinsic invalidity and inadmissibility. These considerations if anything reinforce the view that it is now perfectly possible, without going outside the traditional system of requiring unanimous consent for reservations, to afford ample scope for a facility of making all such reasonable and legitimate reservations as any government intending to accept a convention in good faith is likely to want to make.[2]

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[1] A term employed to denote the government (often that of the country where the conference at which the convention was drafted took place) charged with the duty of carrying out all protocollary functions in connexion with the convention—such as receiving and notifying ratifications, date of entry into force, notices of termination, &c.

(*b*) *Objection on the part of States entitled to become, but not yet actually parties to the convention.* This question, in addition to a specifically 'reservations' aspect, raises the general issue of the status and rights (or obligations) of States entitled to sign, or having signed but not ratified, a treaty.

(i) *The 'reservations' aspect.* In the *Reservations* case, the Court was also asked to pronounce on whether a right to offer objections existed for States which (*a*) had not yet signed the convention, though entitled under its terms to do so, (*b*) had signed, but had not yet ratified. The Court (loc. cit., pp. 27–28) refused to recognize any right of objection for non-signatories, on grounds not very clearly expressed, but apparently to the effect that such States lacked any *locus standi* under, or in relation to, the convention—or that at any rate they had not taken any step manifesting an ultimate intention to participate. This view is not unreasonable, even if it does not perhaps take sufficient account of the modern practice of leaving some conventions open for signature until a certain date (i) in order to give States whose representatives (it may be in an international organization) drew up the convention time for further consideration of its terms; (ii) to enable States which did not participate in the framing to come in as signatories if they wish to—in this way conferring on them a certain definite *locus standi* in relation to the convention.[1] As such States are potential signatories, and therefore, at one remove, potential parties, it is a little difficult to see why they should not be given the same right which the Court admitted for actual signatories, namely, of entering a provisional objection, the operative effect of which would, however, remain in suspense, and only come into force on ratification of the convention, if and when made. Whereas the Court thought (loc. cit., p. 28) that the potential signatory possessed 'no rights which derive from the Convention', it considered the case of a signatory State to be different (ibid.):

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[1] It would certainly have been questioned once whether, in the absence of provision for reservations in the treaty itself, anything short of express consent, given *ad hoc*, would suffice.

[2] It is for this reason that the author, in his *First Report on the Law of Treaties* (see above, subsection 2 (*a*), p. 274, adhered to the unanimous consent system for multilateral conventions, though with certain 'mitigations'—(see pp. 115 and 127 in the printed version).

> '. . . signature constitutes a first step to participation in the Convention . . . it establishes a provisional status in favour of . . . [the signatory] State . . . [which] would justify more favourable treatment being meted out to signatory States in respect of objections than to States which have neither signed nor acceded.
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> 'As distinct from the latter States, signatory States have taken certain of the steps necessary for the exercise of the right of being a party.'

It is true enough that a signatory has taken a positive step, whereas a potential signatory, even if some specific right to sign is reserved under the convention, has not—and therefore has not given any earnest of intention eventually to become a party. The Court continued (loc. cit., pp. 28–29):

> 'Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. . . .
>
> 'Until . . . ratification is made, the objection of a signatory State can . . . not have an immediate legal effect in regard to the reserving State. . . .[2] The reserving State would be given notice that as soon as . . . ratification [has] been completed, it would be confronted with a valid objection which carries full legal effect, and consequently it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation.'

This was an ingenious method of seeking to avoid the difficulties that might result from rendering immediately valid any objections proferred by a signatory, in those cases where signature is never followed up by ratification, or only after a period of years. Nevertheless, the Court's system also involves a number of practical difficulties of application. The general impression left on the mind by the *Reservations* case is that there are few branches of the law in such need of codification, and of the adoption by States of an agreed and uniform system.

(ii) *The status of signatories generally* (see § 1, subsection (8) above). There certainly exists a 'régime' of the signatory State—the position of signatory is not devoid of legal content. It will suffice to reproduce here Article 30 of the author's *First Report on the Law of Treaties*:[1]

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[1] The argument is that such States, when and if they come to sign the convention, have at any rate an initial and provisional right to find it the same as when it was left open for their signature (i.e. not already distorted by the effect of reservations).

[2] The 'between' fallacy again.

'(1) In those cases where signature does not *per se* bring the treaty into force, it has no directly operative effect, and is only concluding. In that case, it does not bind the signatory States, and does not involve for them any obligation either to ratify or finally accept the treaty, or to act in accordance with its provisions. However, the signature

(*a*) will constitute the necessary basis for any subsequent ratification or acceptance, and will involve an obligation to comply with the provisions of the treaty concerning the modalities of ratification, acceptance and other procedural matters;

(*b*) may, in appropriate circumstances, imply that, subject to subsequent consideration, the government of the signatory State will, in the absence of any change in conditions or other unforeseen event, be willing to proceed to ratification or acceptance in due course, or to seek it from, or recommend it to, the competent constitutional organ;

(*c*) may involve an obligation for the government of the signatory State, pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty.

(2) Signature not bringing the treaty into force equally confers no substantive rights under the treaty on the signatory States. But it entitles them to certain rights inherent in the status of signatory, such as—depending on the circumstances, and the terms of the treaty—a right to object to reservations, a right to object to the admission of additional signatories, and a right to insist on the due observance of the provisions of the treaty respecting ratification, the class of States admitted to accede to it, and other procedural matters.'

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[1] pp. 113 and 122; see above, p. 254, n. 2; and see also Sir Hersch Lauterpacht's *First Report* (see above, p. 250, n. 4, comment and notes on Article 5, pp. 56–66).

DR. J. MERVYN JONES

By THE EDITOR

THE *Year Book* has suffered a serious loss in the sudden death at Stuttgart on 9 August 1957 of John Mervyn Jones at the early age of forty-five years. An M.A. and LL.D. of the University of Cambridge and an LL.B. of the University of London, he was formerly a Scholar and Fellow of Gonville and Caius College, Cambridge, Whewell Scholar in International Law and a Scholar and Barrister of Gray's Inn. He also spent a year at the Harvard Law School as a pupil of Professor Manley Hudson. During the Second World War he served in the Treasury and, after the war, he worked first in a research post at the Foreign Office and then in the Secretariat of the United Nations.

Mervyn Jones was a member of the Editorial Committee of the *Year Book* for ten years and he contributed to it a number of excellent articles and reviews. Among the former may be mentioned 'Who are British Protected Persons' (1945) and 'Claims on behalf of Nationals who are Foreign Shareholders' (1949). He gave the same scholarly care to his reviews as to his articles and the present number of the *Year Book* contains a remarkable review by him of Lord McNair's three volumes of *Law Officers Opinions* in which he presents a most illuminating survey of the legal material to be found in the Opinions.

In addition to his contributions to this *Year Book* and to other journals, Mervyn Jones published two books, both of great interest and usefulness and that not only to international lawyers. The first is his *Full Powers and Ratification*, a 'Study in the Development of Treaty-making Procedure', published in 1946, being an enlargement of his fellowship dissertation. This book, which was the fruit of very careful and thorough research, contains more general information about treaties than the title would perhaps suggest. Its importance lies in the fact that it is not a mere record of the forms of full powers and instruments of ratification throughout many centuries and of the relevant State practice. It has the great merit of explaining the influence of earlier forms and practice upon modern treaty-making procedure, and it shows how in the process of 'the development of treaty-making procedure from the simple transactions of princes to the modern complex agreements between States' the conceptions and purposes of full powers and of ratification have been transformed. This scholarly piece of work will surely be of permanent value.

The second book is his *British Nationality Law and Practice*, published in 1947, with a foreword by Sir Eric Beckett, vouching for its high quality. This is a substantial and systematic book dealing with a subject which had then attracted singularly little attention from British writers. Nationality and, even more so, naturalization depend not only on law but also on practice. Mervyn Jones had generous access to the papers both of the Foreign Office and the Home Office and made good use of them. The basis of the book is an examination of judicial decisions, legislation and practice. It also contains chapters on the international law of nationality and on the status of British protected persons, a very numerous class about which it is not easy to find reliable information. The British Nationality Act of 1948 and other legislation necessitated a revised edition, which was published in 1956. Mervyn Jones's book, unless further editions are published by other hands, may diminish in utility with the passage of years, but it will retain permanent value as an exposition of the law of British nationality as it was up to the year 1956.

His legal interests were far from being confined to international law. Amongst other things he worked as poor man's lawyer at Cambridge House Settlement and he wrote in 1940 a very useful and timely Report on 'Free Legal Advice in England and Wales'. He was a modest man with a strong sense of public duty, and for him the law was not merely an intellectual interest or a means of livelihood. He believed in it and was deeply conscious of its importance both to this country and to the larger community of which it forms part. It was, however, to international law that his life and talents were primarily devoted and in him international law had no more loyal or more dedicated a servant.

NOTES

THE DISSOLUTION OF THE INTERNATIONAL RÉGIME IN TANGIER

ON 29 October 1956 an event occurred which, in the preoccupation of nations with the outcome of the October rising in Hungary and with the Anglo-French intervention in Egypt, attracted but little attention. This event was the final dissolution of the International Régime in Tangier which was accomplished by and recorded in the Final Declaration of the International Conference of Tangier which was signed at Tangier on 29 October 1956,[1] by representatives of Morocco and of the following States: Belgium, France, Italy, the Netherlands, Portugal, Spain, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

The desirability of a special régime for Tangier, because of its position as a centre of international activities in Morocco and the fact that the States which were signatories of the Act of Algeciras were interested in ensuring its neutrality, became increasingly recognized in the early years of the present century. The special character of Tangier was first formally recognized in the secret Franco-Spanish Treaty of 3 October 1904 which provided (in Article 9) that Tangier should retain the special character given to it by the presence of the diplomatic corps and its municipal and sanitary institutions. The Act of Algeciras of 7 April 1906[2] also added to the prestige and importance of Tangier by entrusting important administrative duties to the diplomatic corps there. The Protectorate Treaty of 20 March 1912 (Treaty of Fez)[3] provided (in Article 1) that 'la ville de Tanger gardera le caractère spécial qui lui a été concédé et qui sera déterminé par une organisation municipale'. Similarly, the Franco-Spanish Convention of 27 November 1912[4] provided that 'la ville de Tanger et ses environs seront dotés d'un régime spécial qui sera déterminé ultérieurement et formeront une zone entre les frontières plus bas décrites'.

In 1913 a draft Statute was drawn up for the purpose of instituting an International Zone of Tangier, and of ending the anomalous condition under which Tangier was nominally controlled by the Shereefian authorities, who, however, in fact, exercised authority only over the native population, leaving foreigners in the city under the control of their diplomatic and consular representatives and subject to the jurisdiction of their Consular Courts.[5]

The draft Statute prepared in 1913 was never signed, because of the outbreak of the First World War. Ten years later, however, the International Zone of Tangier came into existence as the result of the Paris Conference of 1923. A Statute providing for the organization of the International Zone of Tangier was drawn up and embodied in a Convention which was signed on 18 December 1923 by Great Britain, Spain and France.[6] This Convention provided for the permanent neutrality of Tangier and set up an international administration for 200 square miles of Moroccan territory consisting of Tangier and its environs. Article 5 of the Convention provided that:

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[1] *United Kingdom Treaty Series*, No. 9 (1957). Sweden was not represented at the Conference, but in November 1956 adhered to the Final Declaration and the annexed Protocol.

[2] *British and Foreign State Papers*, vol. 99, p. 141.

[3] Ibid., vol. 106, p. 1023.

[4] Ibid., p. 1025.

[5] See Hudson, in *American Journal of International Law*, 21 (1927), pp. 213–32.

[6] *United Kingdom Treaty Series*, No. 23 (1924).

> 'The Tangier Zone shall possess under authority delegated by His Shereefian Majesty and subject to the exceptions provided for, the most extensive legislative and administrative powers. This delegation of authority shall be permanent and general, except in diplomatic matters, where there shall be no derogation from the provisions of Article 5 of the Protectorate Treaty of March 30, 1912.'[1]

By Article 1 of a Shereefian Dahir the text of which was annexed to the 1923 Convention, and which was promulgated on 16 February 1924, the Sultan proclaimed that:

> 'Dans la région définie à l'article 2 ci-après et qui est qualifiée zone de Tanger, Nous octroyons par les présentes, à une administration internationale une délégation générale et permanente, sous réserve de l'exercice de Nos droits et pouvoirs à l'égard de Nos sujets dans la dite zone, droits et pouvoirs qui seront exclusivement exercés par Notre Mendoub et par Nos fonctionnaires chérifiens à Tanger.'[2]

The organs of government and justice created by the 1923 Convention were:

(i) a Committee of Control consisting of the consuls de carrière of the Powers signatories of the Act of Algeciras (Article 30);
(ii) an international Legislative Assembly under the presidency of the Mendoub (the Sultan's representative at Tangier) and 'composed of the representatives of the foreign and native communities' (Article 32);
(iii) an international Administration headed by an Administrator who for the first six years was to be of French nationality and whose functions were to 'carry out the decisions of the Assembly and direct the international Administration of the Zone (Article 35);
(iv) an international jurisdiction, called the Mixed Court of Tangier, composed originally of French, British and Spanish magistrates, who were to be responsible for 'the administration of justice to nationals of foreign Powers' (Article 48).[3]

In 1928 a Conference was held in Paris for the purpose of amending the 1923 Tangier Convention and for providing that the Italian Government should become a contracting party to the Convention as thus revised. These amendments were embodied in Agreements signed in Paris on 25 July 1928.[4] They did not, in any way, affect the 'délégation générale et permanente' referred to above, nor did they make any fundamental changes in the structure of the International Régime as described above. The International Régime at Tangier continued to function under the 1923 Convention, as amended in 1928 up to and after the outbreak of the Second World War. On 14 June 1940, however, Spanish forces entered and occupied the International Zone on the pretext of preserving its neutrality. For the first four months of this occupation, the organs of government created by the 1923 Convention—the Mixed Court, the International Administration, the Legislative Assembly and Committee of Control—continued their functions, but on 4 November 1940 the High Command of the Spanish

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[1] This Article provided *inter alia* that 'Le Commissaire Résident général sera le seul intermédiaire du Sultan auprès des représentants étrangers et dans les rapports que ces représentants entretiennent avec le Gouvernement marocain'.

[2] Diaz Merry, *Tanger: Tratados, Codigos, Leyes y Jurisprudencia de la Zona Internacional*, p. 235.

[3] For further details about the Mixed Court up to the time of the conclusion of the Convention of 10 November 1952 relating to the reform of the International Jurisdiction in the Tangier Zone (*United Kingdom Treaty Series*, No. 48 (1955)), see the present writer's note 'The Reform of the Mixed Court Tangier' in this *Year Book*, 30 (1953), pp. 498–506.

[4] *United Kingdom Treaty Series*, No. 25 (1928).

Army of Occupation ended their activities and made the Tangier Zone part of the Spanish Zone of Morocco.[1]

In 1945 a Conference was held in Paris for the purpose of re-establishing the international administration of Tangier. This resulted in the Anglo-French Agreement of 31 August 1945[2] which provided that the Spanish Government should hand over to the Committee of Control the administration of the Zone, and that until the entry into force of a Convention drawn up at a Conference which it was intended should be held not later than six months from the establishment of the provisional régime, the Tangier Zone should be provisionally administered in accordance with the 1923 Convention as amended in 1928 and as modified in the 1945 Agreement.

The principal modifications introduced by the 1945 Agreement were as follows:

(i) the United States of America and the U.S.S.R. were given the right to appoint their representatives in Tangier as members of the Committee of Control;[3]

(ii) the Administrator of the Zone was to be a person of Belgian, Netherlands, Portuguese or Swedish nationality selected by the Committee of Control;[4]

(iii) the Committee of Control were given legislative powers which were not, however, intended to supersede those possessed under the 1923 Convention by the Legislative Assembly but to be exercised concurrently.

Of the other Algeciras Powers, Belgium, the Netherlands, Portugal and Sweden acceded to the 1945 Agreement. Spain did not accede, but, as a party to the 1923 Convention and to the 1928 Agreement, accepted with reservations an invitation to participate in the provisional régime. The United States, though not formally acceding to the Agreement, also signified willingness to participate in the provisional régime. Italy was (under Article 11 (*b*) of the Agreement) to be invited to accede to the Agreement at such time as the other parties thereto should agree and subject to any relevant provisions of the Peace Treaty with Italy. By Article 41 of the Peace Treaty, Italy undertook to recognize the provisions of the 1945 Agreement and the Statute of Tangier as well as any provisions which might be adopted by the Signatory Powers for carrying it out. As already mentioned above, the U.S.S.R. took no action to participate in the re-establishment of the international régime.

The Conference provided for in Article 2 of the 1945 Agreement was never held,[5] and the provisional régime continued under the 1945 Agreement without any changes until 1952, when it was amended (under the provisions of Article 8 thereof)[6] by a

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[1] See Delore, in *American Journal of International Law*, 35 (1941), p. 142, and Del Castillo, 'L'Expérience internationale de Tanger', in *Révue internationale français du droit des gens*, 20 (1941), p. 172.

[2] *United Kingdom Treaty Series*, No. 24 (1946).

[3] The U.S.S.R. was listed in Article 2 of the 1945 Agreement as one of the Algeciras Powers. She did not at any time exercise the right given to her by the 1945 Agreement of appointing a representative to the Committee of Control or of having three of her nationals as members of the Legislative Assembly.

[4] The first Administrator selected under the provisions of the 1945 Agreement was a Portuguese, Vice-Admiral Luis Antonio de Magalhais Correira; Stewart, *The International City of Tangier* (2nd ed.), p. 152. The United States had not acceded to the 1923 Convention, as revised in 1928, and was the only country, during the post-war period, to maintain its capitulatory rights in Tangier: see Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., revised, 1945), vol. i, pp. 88–90. Nevertheless, the United States had a continuing interest in Tangier which was recognized in the 1945 Agreement.

[5] For an explanation of the reasons for which the Conference was not held see Stewart, op. cit., p. 161.

[6] Under Article 8 of the 1945 Agreement the Committee of Control were empowered to adopt by unanimous vote any amendments thereto which they considered desirable.

Protocol, signed at Tangier on 10 November 1952, which was concluded for a period of five years and was to be renewed for further periods of the same duration, unless six months before its expiration any member of the Committee of Control requested its revision.

The 1952 Protocol abrogated certain provisions of the 1945 Agreement which related to initial steps in the re-establishment of the International Régime. Otherwise, its purpose was to put the provisional régime on a more permanent footing and to give Spain a greater share in the international Administration, and to this end certain provisions of the 1945 Agreement relating to the Legislative Assembly and the International Administration were amended, and detailed provisions for two police forces—a general police force and a special police force—both under the control of the Administrator—were added to replace Article 47 of the 1923 Convention which was to remain abrogated.

In the event, the duration of the 1952 Protocol was less than five years. On 2 March 1956 negotiations between the French and Moroccan Governments resulted in a Declaration affirming that 'following on the progress realised by Morocco the Treaty of Fez of March 30, 1912, no longer corresponds to the necessities of modern life and can no longer govern Franco-Moroccan relations', and stating that 'in consequence the French Government solemnly confirm their recognition of the independence of Morocco and their will to respect and make others respect the integrity of Moroccan territory guaranteed by international treaties'. Annexed to the Declaration was a Protocol which stated, amongst its other provisions, that 'Legislative power is exercised by His Majesty the Sultan in full sovereignty'.

Following the Franco-Moroccan Declaration and Protocol of 2 March 1956, other States, including the United Kingdom, recognized the complete independence of Morocco. One result of this recognition was to set on foot arrangements for bringing to an end the international régime in Tangier, the existence of which the Moroccan Government asserted, and the other Powers concerned tacitly accepted, was incompatible with the full independence of Morocco. A Protocol, recording arrangements between the Moroccan Government and the representatives on the Committee of Control, of the following countries: the U.S.A., Belgium, France, Great Britain, Italy, the Netherlands, Portugal and Spain was drawn up on 5 July 1956.

The purpose of the Protocol was to provide for a transitional period which should precede the conclusion of negotiations for a settlement of the questions raised by the contemplated abrogation of the International Régime. The most important provisions of the Protocol were the following:

(i) the appointment of Administrator of the Zone was abolished, and his functions were assumed by the Mendoub, the Sultan's representative in Tangier who was to act as Governor (Article I);

(ii) the services of the International Administration were to continue, during the transitional period, under the direction of the Mendoub (Article II);

(iii) the Legislative Assembly was to hold only three more sessions and their competence was restricted to matters of a regional nature (Article IV);

(iv) the Committee of Control was to abstain from exercising its legislative powers (Article VII);

(v) the International Jurisdiction was to continue during the transitional period (Article VIII) and the existing instruments governing the Tangier Zone, in so far as they were consistent with the terms of the Protocol, were to continue to apply (Article IX).

In October 1956, at the invitation of the Sultan of Morocco, a Conference was held at Fedala and in Tangier to settle the questions raised by the abrogation of the special Régime of the Tangier Zone. The non-Moroccan governments which were represented on the Committee of Control participated in this Conference on the basis that it would result in an international agreement terminating the existing régime in Tangier. At first, however, the Moroccan Government appeared to be of the opinion that any international agreement for the abolition of the International Régime was inconsistent with Morocco's new independence, and they consistently maintained that, as far as the Moroccan Government was concerned, all that was necessary was to revoke the 'délégation permanente et générale' of the Sultan's powers in relation to Tangier embodied in the Dahir of 16 February and that this could be done by unilateral action on the part of the Moroccan Government. This contention was based on the view that Morocco was not a party to any of the instruments creating, maintaining and re-establishing the International Régime.

Legally, it was possible to maintain that the Moroccan Government were bound by the 1928 Tangier Convention (as amended and modified) on the ground that France, who under Article V of the Treaty of Fez became responsible for the international affairs of the whole of Morocco, had become a party to the Convention, and to the instruments amending the Convention, not only on behalf of herself, but on behalf of Morocco. This thesis, was, however, not accepted by the Moroccan Government or indeed by all of the other Powers represented at the Tangier Conference. In support of the contrary view, it was possible to maintain that in entering into the 1923 Convention, as well as in concluding the Convention of 27 November 1912 with Spain, France was acting under Article I of the Treaty of Fez, which related both to what became the Spanish Zone of Morocco, and to Tangier, and was not acting under the powers conferred on her in relation to Morocco's external affairs under Article V of that Treaty, and that in the case of neither of the international agreements resulting from Article I of the Treaty of Fez was France acting on behalf of Morocco. It was at least certain that France had not regarded herself as acting on behalf of Morocco in concluding the Franco-Spanish Convention of 27 November 1912[1] and no satisfactory evidence could be produced of any intention on the part of France to enter into the 1923 Convention or any of the subsequent instruments on behalf of Morocco. None of those instruments specifically state that France was acting on behalf of Morocco, and this omission may be contrasted with the Convention of 29 July 1937[2] between the United Kingdom and Morocco for the Abolition of Capitulations in the French Zone which was concluded by the President of the French Republic 'acting in his own name and on behalf of His Majesty the Sultan of Morocco'.

The legal arguments outlined above were not produced on the floor of the Tangier Conference, however much they were debated by delegates behind the scenes. What was, however, repeatedly asserted at the Conference by the United Kingdom and the other non-Moroccan Delegations was that the international régime which was based on agreements to which all the Governments represented at the Tangier Conference, other than the Moroccan and United States Governments, were parties, could not be terminated simply by unilateral action, i.e. abrogation of the 1924 Dahir, on the part of the Moroccan Government. After prolonged discussion and the consideration and rejection of a number of other proposals and drafts, it was at last agreed that in the Final Declaration of the Tangier Conference it should be stated that the Governments of Belgium, Spain, U.S.A., France, Italy, Morocco, the Netherlands, Portugal and the United Kingdom 'agree to the abolition of the international régime of the Tangier Zone and declare abrogated, in so far as the said Governments were parties thereto, all the acts, agreements and conventions concerning the said régime'.

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[1] In a note dated 19 January 1917 from the French Ambassador in Washington to the United States Secretary of State (Annex A, to 'Preliminary Objection in the case of *Rights of Nationals of the United States of America in Morocco*', *I.C.J. Reports*, vol. i, 1951, pp. 239–40), it was stated that 'the Spanish rights are mentioned in it [Treaty of Fez] (Article I) as being defined by an Agreement between the Governments *not of Morocco*, but of France and Spain'. The italicizing is the present writer's.

[2] *United Kingdom Treaty Series*, No. 8 (1938).

The International Régime was not, however, swept away without any provision being made for the settlement of certain questions arising out of its abolition. A Protocol annexed to the Convention contains provisions relating to concessions, leases and authorizations acquired before or after the promulgation of the Tangier Statute which if 'regularly acquired and legally approved by Dahir of H.M. the Sultan', will continue to be respected and if granted less regularly will be the subject of 'the earliest possible settlement in accordance with the principles of justice and equity'. Under the Protocol, former employees of the international Administration receive compensation for the loss of their employment. In addition to the compensation payable under the Tangier Statut de Personnel,[1] former employees who are discharged without having been offered re-employment by the Moroccan Administration receive compensation equal to one year's salary. Other former employees who are offered, but do not wish to take up such employment, receive six months' salary. These provisions were debated at length at the Conference, and the United Kingdom delegation was in the forefront of those Delegations which maintained that it would be quite inequitable in the circumstances of the dissolution of the International Régime to grant to former employees of the International Administration only the compensation provided for by the 'Statut de Personnel'.

Similarly, the Protocol provides for the extension to Tangier of the Postal, Telegraphic, Telephonic and Broadcasting monopoly enjoyed by the Moroccan Government in other parts of Morocco. In the light of this provision the United Kingdom and Morocco agreed to the closing down of the British Post Office in Tangier; this took place on 30 April 1957, shortly after the office had celebrated the centenary of its existence.

The Protocol also provides, *inter alia*, for the continuance of 'Laws and regulations in force in the Tangier Zone on the date of signature of the present Protocol as long as they are not modified or abrogated'. This, at least, calmed the fears of those who had fearfully contemplated the revocation of all existing legislation at the moment when the International Régime was dissolved. The International Jurisdiction is not specifically mentioned in the Protocol, but verbal assurances were given during the Conference that it would continue to function, subject to certain changes, e.g. that the control of the Parquet should come under the Moroccan Ministry of Justice. At the moment of writing the International Jurisdiction exists in Tangier as part of the Moroccan judicial system. Further changes are, however, not unlikely to be made in its structure and personnel.[2]

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[1] Laws of 20 March and 17 August 1950.

[2] The Convention of 10 November 1952 relating to the Reform of the International Jurisdiction in the Tangier Zone is one of the international Conventions abrogated by the Tangier Declaration of 29 October 1956. All the provisions of the Convention (with the exception of Article 1, which amended Article 48 of the 1923 Convention, and the final provisions) were, however, embodied in a Dahir of 10 June 1953 which remained in force under Article 3 of the Protocol annexed to the Tangier Declaration, though subject to modification or repeal.

The 29th of October 1956 marked the end of an epoch in Tangier and the disappearance of a régime which has been variously described as 'a condominium of select States', 'an international protectorate' and 'un régime de souveraineté dispersée ou de souverainetés communes'.[1] The termination of an interesting and not unsuccessful experiment in government by international co-operation may be regretted, but no one can be found to argue that the continued existence of the International Zone would have been compatible with the full independence of Morocco. The future of Tangier itself was not within the terms of reference of the Conference which completed its work on 29 October 1956. How far the Moroccan Government are prepared to give to Tangier the status of a free port, and to preserve the advantages it has hitherto enjoyed as a trading centre because of its free currency market, are questions to which no definite answer is yet forthcoming.

J. A. C. Gutteridge

THE FOREIGN OFFICE CERTIFICATE: SOME RECENT TENDENCIES

There are certain facts involving matters of international law in respect of which, when it is required to prove them before a court of law, it is customary to apply to one or other department of the Executive for a certificate. So much is by now established practice and the categories of such facts are fairly well defined.[2] They comprise such matters as the recognition and the status of foreign States and Governments and monarchs, the commencement, existence and termination of a state of war, the possession of diplomatic status, and so on. The categories are probably not closed but are not, it seems, likely to be extended. Certainly, as will be shown, there are other facts involving matters of international law on which it does not seem ever to be the practice to apply to the Executive. In this connexion it may also be mentioned that, although the Crown did intervene in 1879 to inform the Court that the *Parlement Belge*[3] was a public ship, it has not again given the Court information as to the status of property in dispute in a case involving a foreign sovereign. Perhaps the Crown has not been asked to do so. At any rate it did not do so even in the *Dollfus Mieg*[4] case, which concerned bars of gold held in the Bank of England on the account of the Governments of the United Kingdom, the United States of America and France, when it was itself directly interested.

I

It may be that the courts themselves are reluctant to permit the extension of the category of facts which the Crown is to be asked to certify—that reluctance would be consonant with the traditional distrust of the Judicature for the Executive. Such a mistrust—or at least a coolness—towards any approach by the Crown into the forensic sphere has been manifested by the English courts in a number of recent cases,[5] including cases in which questions of international law were raised. For example, in a case heard in 1953 we find a clear intimation that there may be a limit to the category of questions on which the Courts will inform themselves by inquiry of the Executive. In *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*,[1] the plaintiffs sought to establish the approval or acquiescence of the British Government in certain Decrees of the Netherlands Government. Said Devlin J.:

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[1] Delore, op. cit., p. 145; Stewart, op. cit., p. 152; Oppenheim, *International Law*, vol. i (8th ed.), p. 195, n. 2; Del Castella, op. cit., p. 172.

[2] They are set out in Oppenheim's *International Law*, vol. i (8th ed. by Lauterpacht, 1955), p. 765, and also in this *Year Book*, 23 (1946), p. 240.

[3] (1879), 4 P.D. 129.

[4] *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, [1949] 1 Ch. 369; C.A., [1950] 1 Ch. 333; [1951] 1 Ch. 33; H.L., [1952] A.C. 582.

[5] See, for example, *Broome* v. *Broome*, [1955] 2 A.E.R. 201.

> 'If the approval and acquiescence of the British Government is relevant, I do not think that it is a matter to be inferred from their conduct. The only way for the court to ascertain such a matter, when it is relevant, is by making enquiry of the appropriate Minister. There is no precedent for that course in a case of this sort . . . ; I think it would be wrong and unnecessary. It is wrong, because it would put it in the power of the Crown to legislate in a way which might affect the rights of British subjects—for example, creditors of a foreign national—without the authority of Parliament. It is unnecessary, because the Government could . . . obtain from Parliament . . . such powers as Parliament thought necessary for enforcing as part of the law of England any foreign legislation which was in the common interest.'

There is much in the learned judge's remarks to recall those of Lord Sumner in *Musmann* v. *Engelke*,[2] protesting against the acceptance of the Foreign Office presentation of the type of work done at the German Embassy by the respondent: 'To do so would be to substitute a department of the Government for the Courts in a class of case where such substitution has never hitherto been recognised.' But if the attitude of the British Government to an Allied State is not to be ascertained from the British Government, from whom, it may be asked, is it to be ascertained? Mr. Justice Devlin gives no assistance towards answering that question; certainly he cannot be taken as meaning that the parties to a lawsuit must wait for suitable legislation.

II

It may be of interest to consider some of the more recent reported cases in which a certificate of the Executive has been sought and has been furnished for the enlightenment of the Court, and the way in which the Court has received the certificate. One of those cases was *Holdowanski* v. *Holdowanska*,[3] in which the husband sought dissolution of a marriage into which he had entered while serving with the Polish forces in Italy in 1946. In that case, Counsel for the Queen's Proctor argued that where a marriage takes place in a country occupied by a belligerent army, the requirements of the *lex loci* in point of form no longer apply. Counsel for both sides agreed a question as to the precise duties of the Polish 2nd Corps in Italy, and it was submitted with others to the Foreign Office. The answer of the Foreign Office was that both before and after 14 February 1946 the Polish land forces in Italy were forces in belligerent occupation of Italian territory. Counsel for the petitioner then submitted, in accordance with practice, that the meaning of that answer was a matter of law for the Court to decide. The Court (Karminski J.) said:

> 'I do not think that the Foreign Office answer (taken in conjunction with another answer as to the position in Italy of the British land forces) means more than this: that the allied forces having fought their way by force of arms into Italy in 1943, were still there under arms in 1946. . . . In my view it is sufficient to accept that the [husband] was at the time of the ceremony of marriage a member of a military force in occupation of a foreign state.'

Here, the answer of the Foreign Office, which must have been of considerable length, seems largely to be brushed aside and its effect reduced to one sentence—that the allied forces were under arms in Italy in 1946. This does not appear to be what learned counsel were at such pains to ask and it may not be easy to see how the result will encourage either litigants to seek information of the Foreign Office or the latter to give it.

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[1] [1953] 1 Q.B. 248.

[2] [1928] 1 K.B. 90, 116.

[3] [1956] 3 A.E.R. 457.

Even scantier regard appears to have been paid by the Court to the Foreign Office Certificate in another 1956 case, that of *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd.*,[1] which arose out of a war risks clause in a charterparty under which the vessel had liberty to comply with directions given by the Government of the flag State 'or any other government'. While on her voyage in July 1953 the vessel was intercepted by a warship of the Chinese Nationalist forces and escorted to a port in Formosa. On inquiry for the purposes of this case, the Foreign Office stated[2] that the British Government had not, at the date of the incident, recognized the so-called Nationalist Government of China as being either a *de jure* or *de facto* Government of China, and that Her Majesty's Government did not recognize that any Government was located in Formosa in July and August 1953.

In an arbitration, the Umpire held, subject to the decision of the Court, that those governing Formosa were a Government. The case came before Mr. Justice Sellers, who said in the course of his Judgment:

> 'If the view of the Foreign Office is not to be held as conclusive, or as exclusive of all other evidence, it was not submitted by the charterers that there was no evidence to establish or justify the finding in the award. It was, however, strongly submitted that the court could not go behind or beyond the Foreign Office statement. . . .'[3]

The learned Judge observed that as a matter of construction of the charterparty, there would seem to be no ground for saying that the authority giving the orders or directions had to be a Government recognized as such by Her Majesty's Government here. He asked:

> 'Is there a rule of law which restricts the evidence to be considered to that provided by the Foreign Office, or which precludes the tribunal of fact [the arbitrators] from finding that there was a government in Formosa on all the evidence which was adduced?'[4]

His Lordship thought that the authorities did not establish that the Umpire had erred in not treating the Foreign Office statement as final and conclusive, and added: 'It seems to me to be a very different question from a Sovereign seeking immunity from the jurisdiction of our courts [citing *Duff Development Co.* v. *Kelantan Government*].[5] It may well be undesirable that in such a matter a conflict should arise between Her Majesty's Government and a British court.' He also cited *White, Child & Beney Ltd.* v. *Simmons*[6] (in which the Foreign Office had declined to state the precise date at which the existing Soviet authority had come into being as a Government, and therefore the Court of Appeal held that it became a question of fact, and the Court was entitled to give effect to the evidence even if it was inconsistent with the opinion given by the Foreign Office). He continued:

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[1] [1956] 2 A.E.R. 769, [1956] Ll.L. Rep. 97.

[2] It would appear that the statement of the Foreign Office was contained in a series of letters. According to the account given in *Lloyd's List Law Reports* (at p. 100), 'The umpire said that before the hearing of the arbitration took place the solicitors for the parties corresponded with the Foreign Office and received various answers from that department to the questions they had asked, and in so far as the answers given by the Foreign Office purported to state facts, the umpire found, in accordance with such statements, that the most relevant facts established by the Foreign Office answers seemed to him to be (1) that Her Majesty's Government had at all material times ceased to recognize the former Nationalist Government of China as being either the *de jure* or *de facto* Government of the Republic of China, and (2) that Her Majesty's Government did not recognize that any Government was located in Formosa in July and August, 1953.'

[3] [1956] 2 A.E.R., at p. 773.

[4] Ibid., at p. 774.

[5] [1924] A.C. 797.

[6] (1922), 127 L.T. 371.

> 'Apparently, the government situated and functioning in Formosa was at one time recognized by this country, and it does not follow that because recognition has ceased . . . the government . . . has in any way altered its activities or lost such powers and authority as it had been exercising. Nor would it seem that recognition or non-recognition would in any way affect the risk of a vessel being accosted on her voyage.'

The Judge therefore followed the decision of the Court of Appeal in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co. Ltd.*[1] that the question whether on the true construction of the charterparty war had broken out involving Japan was not conclusively determined by the view of His Majesty's Government. In that case, Mr. Justice Goddard had not thought that the parties in an action of that sort were going into the niceties of international law; 'and, may I add, as applicable to the present case, into the niceties of diplomacy'.

In another case which shortly afterwards came before Mr. Justice Sellers, the Court and the parties, showing something less than a proper regard for 'the niceties of international law and diplomacy', strove to establish what may be called a politico-geographical fact by making inquiries of both the British and a foreign Government. In *Stafford Allen and Sons Ltd.* v. *Pacific Steam Navigation Co.*[2] the question at issue was whether Cristobal, in the Panama Canal Zone, was a port in the United States. When the case came before Mr. Justice Sellers on a preliminary point of law, he adjourned the hearing for inquiry to be made whether the United States Carriage of Goods by Sea Act, 1936, applied to the Canal Zone. On the hearing being resumed, Counsel stated that a number of general Acts and other documents had been examined at the United States Embassy in London, but they did not assist. Attempts were being made to obtain a copy of the Canal Zone Code. The Judge observed that the best evidence as to whether Cristobal was a port in the United States would be the evidence of the United States Government itself. The Court was being asked to decide that momentous question, and if he (the Judge) said that it was, and the United States Government said that it was not, the position would be very unsatisfactory.[3] Counsel replied that an effort was made by plaintiffs to get the view of the United States Embassy on that apparently simple question, but the answer was a suggestion that plaintiffs should consult an American lawyer. Mr. Justice Sellers adjourned the further hearing commenting:

> 'So far as I understand it, the best evidence for this Court would not be the evidence of an American lawyer; it would be a statement from the American Government.'

On the resumption of the hearing, Counsel for the defendants stated that inquiries had been made of the United States Embassy as to whether Cristobal could be regarded as a port in the United States, and as a result there had been a communication from America, giving the opinion of the Assistant General Counsel to the United States Maritime Administration. That opinion set out that the Maritime Administration had sought the views of the Panama Canal Company as the instrumentality of the United States which was charged with the operation of the Panama Canal. The opinion set out those views, based on a number of American judicial decisions, and concluded by stating that the views of the Company were consonant with the ruling of the Supreme Court of the United States in *Panama Railroad Company* v. *Johnson.*[1] Counsel said that the question whether Cristobal could be regarded as in the United States was not answered at all; it was a fair summary of the information received to say that there was no reported case in America which gave, in terms, an answer to the question. Counsel for the plaintiffs then handed in a copy of the Canal Zone Code.

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[1] [1938] 3 A.E.R. 80, (C.A.) [1939] 1 A.E.R. 819.

[2] [1956] Ll. L.R., 104.

[3] In 1828, in *Taylor* v. *Barclay* (2 Sim. 213), Shadwell V.-C. was content that 'the courts of the King should act in unison with the King'. Unison with a foreign potentate is, perhaps, a new aspiration. It is not difficult to imagine cases in which embarrassment might be caused by an inquiry which related to some part of the world the status of which was viewed differently by the United Kingdom and, for example, the United States of America.

In a reserved judgment Mr. Justice Sellers said that he did not propose to decide that issue as if he were an American judge sitting in an American court. It seemed to him that it would be irregular and undesirable for him to do so. If Cristobal was in the United States of America as a matter of geographical fact there must be some authentic way in which that could be established; if it was to be regarded as a port in the United States for the purpose of the United States Carriage of Goods by Sea Act, that would appear to be a question of American law which would have to be proved as a fact. Both parties submitted that the issue should be decided by the construction of the bill of lading, and that the Court should answer the question: What would the ordinary trader think when he read in its context 'a port in the United States'? It seemed to him (his Lordship) to be unsatisfactory that the bare construction of the contract might lead to the conclusion that the port in question was in the United States if the correct Government or geographical view was that it was not, or vice versa. He adjourned the hearing so that what would appear to be the best evidence—the United States Governments view of the status of the port of Cristobal—might be obtained.[2] The parties had sought to obtain that information before, and even now neither the American Government nor our own Foreign Office had made a pronouncement on the matter. The case did not seem to him to be so much a matter of the true construction of the bill of lading as a matter of geographical fact accepted by America and recognized by our country and to be proved by high sources.

As the case stood, he must decide the issue either on evidence of the American law on the subject or on the construction of the contract. If the American law could regard Cristobal as a port in the United States for the purpose of the Carriage of Goods by Sea Act, he could not think that our courts dealing with a shipment from Cristobal to the United Kingdom would take a contrary view of a clause incorporating the Act. He accepted the plaintiff's submission that the Court must look at the Act itself and the opinions expressed as to its applicability. The evidence was—and his Lordship so found—that the American Carriage of Goods by Sea Act, 1936, was applicable to the Canal Zone, and therefore, for the purposes of the Act, Cristobal was a port in the United States.

When the case went to appeal,[3] counsel for the appellants submitted that the only evidence at which the Court was entitled to look was evidence as to the treaty relations between the United States and the Republic of Panama. Lord Justice Denning asked: 'Is not this the kind of case on which we write to the Foreign Office?' Counsel replied that both parties had written, one to the United States Embassy and the other to the Foreign Office. On this simple question: 'Is Cristobal regarded generally as a port in the United States?' the United States authorities had expressed no view. The Foreign Office had said that it was not a question of fact but of the construction of a commercial document by the Court.[1] Lord Justice Denning commented: 'We have an unusual field to inquire into. We have to step in where angels fear to tread.'[2] On reviewing all the material[3] which had been put before the Court it seemed to his Lordship reasonably plain that the term 'United States' in the Act of 1936, including as it did the possessions of the United States, included the Panama Canal Zone because that was, in the ordinary use of language, a possession of the United States.[4]

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[1] (1924) 264 U.S. 375; [1924] A.M.C. 551.

[2] See, however, note 3, p. 305, above.

[3] [1956] 1 Ll. L.R. 495; [1956] 2 A.E.R. 716.

At the beginning of this century the Foreign Office appears to have had no difficulty in certifying whether the inhabitants of certain territory were under the sovereignty of one foreign State or another. In *Foster* v. *Globe Venture Syndicate*[5] the question arose whether the territory called Suss was within the dominions of the Sultan of Morocco and whether the tribes of Suss were independent. Farwell J. said that he would apply to the Foreign Office for information; he would communicate the result to the parties and would allow no further discussion. In due course, 'As to the tribes of Suss, his Lordship knew from the answer of the Foreign Office to his enquiry . . . that they were not independent but subject to the jurisdiction of the Sultan of Morocco'.[6]

A similar contrast between an earlier and a more recent practice is apparent when we compare two cases arising out of loss or damage to property caused during the Russian Revolution of 1917 and the Spanish Revolution of 1936 respectively. In the former action, the plaintiffs made determined efforts to obtain from the Foreign Office sufficient information pertinent to their case to enable the Court to reach a definite decision on the nature of the disturbances which caused the losses in question. In the later action, no approach seems to have been made to the Foreign Office for assistance, and the picture is one of the Judge of first instance, the Court of Appeal and the House of Lords picking their successive ways through a cloud of inconsistent and unreliable evidence.

In *White, Child and Beney Ltd.* v. *Eagle Star and British Dominions Insurance Company*,[7] the plaintiff insured with the defendants certain property in Petrograd against (*inter alia*) loss or damage caused by 'civil war, revolutions, rebellions, military or usurped power'. The policy excepted claims for 'confiscation or destruction by the Government of the country in which the property is situated'. In December 1917 the Bolshevists seized the insured property. The question before the Court was whether 'the Bolshevists', i.e. the Russian Soviet Republic, was at that time recognized as the Government of the country or whether the loss was a loss by 'rebellions, military or usurped power'.

I have elsewhere[8] given in detail the correspondence between the plaintiffs and the Foreign Office, and also between the latter and the Court, which made its own request for information. Briefly, the Foreign Office not only wrote to the plaintiffs about the recognition by H.M. Government of the Soviet Government as the *de facto* Government of Russia, but also sent a diary of events in Russia during the relevant period. The Foreign Office, moreover, furnished the Court with an outline history of the advance and subsequent flight of Kerensky, the constitution of the Russian administration of November 1917, the meeting and subsequent dissolution of the Constituent

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[1] The statement of the Foreign Office is not reproduced in the reports but there is no reason to believe that it was as categorical as Counsel is reported as indicating.

[2] *The Times* newspaper, 20 April 1956.

[3] Including Knauth, *The American Law of Ocean Bills of Landing*, 4th ed., p. 149.

[4] For a note on the Status of the Panama Canal Zone by F. H. [Honig] see *Law Journal*, 106 (1956), p. 438.

[5] [1900] L. Ch.D. 811.

[6] *The Times* newspaper, 7 April 1900.

[7] (1922), 38 T.L.R. 367, (C.A.) 616.

[8] See this *Year Book*, 29 (1952), pp. 235–9.

Assembly in the following months, and so on. Evidence was given by Russian witnesses as to the condition of affairs in Russia in connexion with the Russian Banks when the Bolshevist Revolution occurred in December 1917, but not apparently as to the disturbances in Petrograd at the time or as to the political history of those days; this hiatus was largely filled by the contents of the various communications from the Foreign Office. Roche J. at first instance held that the acts causing the loss of the property in Petrograd were acts of revolution, and of military and usurped power. The Court of Appeal, however, reversed this decision, holding that the acts were a confiscation by the Government of Russia.

The case which arose out of damage caused during the Spanish revolution was *Pesquieras y Secaderos de Bacalao de Espana, S.A.* v. *Beer.*[1] It related to four trawlers owned by the plaintiff Company which were insured against loss or damage caused by riots or civil commotion 'excluding war risks'. In 1936 the trawlers were seized in the course of disturbances in San Sebastian. The plaintiffs claimed that the disturbances came within the terms of the policy: the defendant, an underwriter, contended that the loss and damage to the trawler was caused by war.

Mr. Justice Atkinson, as he then was, found himself faced with the task of determining what happened in Spain in 1936. He had before him some fifteen affidavits and he heard the oral evidence of a number of witnesses, all directed to the question of whether the situation in Spain at the relevant time, when 'strikes were frequent, and riots and crimes, and the lives and property of people . . . were in constant danger amounted to civil war'. The learned Judge had to review a mass of conflicting evidence, not all honest, on the organization of the many political parties in Spain, the outline history of the rising of General Franco, and the detailed events attending the seizure of the four trawlers. After a hearing which lasted nine days he came to the conclusion that there was an extreme state of civil commotion but there was not, at the time when and the place where the trawlers were seized, anything amounting to civil war.

In the Court of Appeal,[2] Lord Greene M.R. took occasion to observe that he took a serious view of the affidavits and the fact that 'the phraseology used in some of them was exactly similar . . . [it] . . . came from a form that someone had drawn up'. He termed the affidavits 'disingenuous'. He found it necessary to submit the evidence on both sides to the most critical examination: 'No one reading the affidavits would suppose that there had ever been a civil war.' His scrutiny of the evidence runs to more than a dozen pages of the law report. (In the event, the Court of Appeal held that there was civil war in the area in question.) In the House of Lords[3] Lord Porter observed:

> 'In circumstances of this kind, it is difficult to place much, if any, reliance upon affidavits furnished by people living under the present régime.'

Whatever shortcomings may have been found in Foreign Office certificates, it has never been said of them that they were unreliable. That is not to say, of course, that the Foreign Office would have been as willing in 1946 as it had been twenty-two years earlier to act as witness of historical fact. But there is no reason to think that it would not, and one is moved to wonder how much public (and private) time and money might have been saved in the *Pesquieras* case had the Court had before it some reliable evidence in the form of a communication from the Foreign Office on the lines of that supplied in the *White, Child and Beney* case.

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[1] (1946) 79 Ll. L.R. 417; 165 L.T. 495.

[2] (1947) 80 Ll. L.R. 319.

[3] (1949) 82 L.L.R. 501.

III

One class of case in which the Foreign Office does not appear (at least so far as the law reports go) ever to have supplied for the assistance of a Court information about a matter as to which it might be thought to have better sources than has the ordinary litigant is the class of case where the question is that of the status of a foreign corporation which is or claims to be a department or emanation of a State. The practice is otherwise in the United States. For example, in *Piascik* v. *British Ministry of War Transport*[1] the fact that the defendant 'was and is a department of the Government of the United Kingdom' was communicated to the Court by the Department of State with an intimation that the latter recognized the defendant as a duly constituted department of the British Government and therefore entitled to immunity from judicial procedure. The English courts have generally been content to rely on either an affidavit or a certificate (exhibited, as a rule, to someone else's affidavit) of the ambassador of the foreign State concerned. One of the first of these cases was *Compania Mercantil Argentina* v. *United States Shipping Board*.[2] In that case the evidence as to the status of the defendant Board included a certificate of the American Ambassador that the United States Shipping Board was a Department of the State of the United States of America, and an affidavit by the legal adviser to the Board deposing as to its constitution.

In another case, *Krajina* v. *The Tass Agency and Another*,[3] the evidence before the court[4] consisted of the full text of the statute establishing the Tass Agency and a translation thereof. In the course of his judgment, Tucker L.J. said that it was common ground that the certificate of the Russian Ambassador was not conclusive of the question whether the defendant Agency was part and parcel of a sovereign independent State, viz., the U.S.S.R., 'though, no doubt, it is evidence of very high evidential value and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured'. Later, however, he is heard to complain that 'the only evidence before the Court was the translation of the statute, the ambassador's certificate and the affidavit of the legal adviser to the Russian Trade Delegation'. The Court of Appeal had given both parties an opportunity to adduce further evidence, but neither party was able, or, at any rate, willing, to do this. The Court had to do its best on the 'very scanty material' before it; should there be further proceedings, further evidence might be forthcoming. There were no further proceedings, and the *Tass* case remains an authority for nothing except the proposition that in cases of this kind the 'best evidence', that is the ambassador's certificate that the defendant was a department of State, is sufficient to shift the onus of proving that it was a separate entity from the plaintiff.

In the last case to be noted, *Baccus S.R.I.* v. *Servicio Nacional del Trigo*,[5] the Court again had to do what it could with a cloud of 'best evidence', and at least one Judge of the Court of Appeal was heard to complain that the evidence was not enough. The defendants were a body which had corporate status by the laws of Spain and carried on business there, buying and selling grain. According to the affidavit of the Spanish Ambassador in London (a former Minister of Agriculture), the defendants were a department of the Spanish Ministry of Agriculture and the head of the Department was a Spanish civil servant subordinate to that Department. The defendants applied for the writ issued against them to be set aside 'on the ground that they are a department of the State of Spain and that the State of Spain, through its Ambassador at the Court of St. James, claims sovereign immunity . . .'.

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[1] (1943) 54 F. Supp. 487; *Annual Digest and Reports of Public International Law Cases, 1943–1945*, Case No. 22. See also this *Year Book*, 24 (1947), at p. 141.

[2] (1922) 93 L.J.K.B. 816; 131 L.T. 138.

[3] [1949] 2 A.E.R. 274.

[4] The Court of Appeal. The proceedings at first instance were in Chambers and are not reported.

[5] [1956] 3 A.E.R. 715.

Affidavits were put in by Mr. Valls, a member of the Spanish Bar, setting out part of the Decree-Law which brought the Servicio Nacional del Trigo into being as a Department of the State, and other relevant decrees, and showing that the organization had legal personality for the carrying into effect of certain acts and transactions. The Spanish Ambassador in his affidavit confirmed that the defendants were a Department of the Spanish Ministry of Agriculture. He also claimed that the entry of appearance and other steps taken in the action by the defendants had been effected without the knowledge of the Spanish Government, his affidavit culminating in the following homily:

> '3. It is contrary to the dignity sovereign immunity and public policy of the State of Spain to allow a foreign court to adjudicate upon the rights and obligations of the state or of any of its departments or to be compelled to submit to the jurisdiction of a foreign court or to permit a continuation of proceedings instituted against the State or any of its departments in a foreign Court.
>
> '4. The State of Spain does not consent to these proceedings or the continuation thereof and has never consented thereto. Such continuation would constitute a violation of the sovereign immunity of the State of Spain which I have no doubt this Honourable Court will not countenance.'

To this, Lord Justice Singleton replied, mildly enough:

> 'I feel quite sure that the Ambassador is right in saying that the Courts of this country would not knowingly do anything which they understood to be a violation of the sovereign immunity of the State of Spain; but the position in this case is somewhat unusual. The State of Spain has set up for its own purposes something which is described in different ways, and in the affidavit of Mr. Valls it is described as a legal personality.'

The affidavit of another witness, also a member of the Spanish Bar, on behalf of the plaintiffs, set out facts in support of a statement that the defendant had its own independent administration, and concluded that 'the Servicio Nacional del Trigo has full juridical personality and is competent to enter contracts [*sic*] and to commence and defend actions in the English Courts'. Other affidavits were filed by the witnesses, dealing with the question whether the defendant was autonomous or a department of the Spanish Ministry.

Singleton L.J. complained that, for all these affidavits, the Court had not sufficient information to enable it to come to a decision regarding the juridical status of the Servicio Nacional del Trigo. (His Lordship quoted at length from the *Tass* case.) Jenkins L.J., however, thought that the evidence showed quite clearly that the defendants were formed as a department of State, leaving it for the Court to decide whether immunity could or could not be claimed on behalf of a separate legal entity engaged in trading activities.

Parker L.J. was satisfied that the Servicio Nacional del Trigo were a Department of the State of Spain. 'Whether or not they are such a Department is clearly a matter of Spanish law, and His Excellency the Spanish Ambassador has sworn that they are. . . . Though that evidence is not conclusive, it is entitled to considerable weight.' It was particularly true that it probably was the best evidence that could be procured because the Ambassador was not only a member of the Spanish Bar but was also himself at one time Minister of Agriculture. The learned Lord Justice saw no inconsistency between the defendants being a legal personality and their 'remaining and being a Department of State'.

A. B. LYONS

DÉTOURNEMENT DE POUVOIR BY INTERNATIONAL ORGANIZATIONS

THE specialized agencies of the United Nations, and other similar international bodies, have each a set of executive and administrative organs which combine to carry out the agency's tasks. These organs are mainly of three types: a conference or assembly of the member states composing the agency; an executive board or council appointed by the member states; and a management with supporting international staff. The powers and duties of these organs are assigned to them with varying degrees of precision by the international instruments establishing the agencies. This note seeks an answer to the question—In what ways can action by an organ of such an agency constitute a *détournement de pouvoir*?

I

A *détournement de pouvoir* may be said to occur where the grantee of a discretionary power exercises that power in the course of public administration, not in breach of any legislative provision, but for a purpose other than that contemplated in the grant.

The basis of the definition which is offered here will be explained below; but it is first to be observed that no constitution of a specialized agency of the United Nations expressly provides for the control of *détournement de pouvoir* by the agency. The doctrine, however, is not only well developed in several countries[1] but has had some international recognition;[2] and it seems reasonable to regard it as implicit in the structure of those international organizations at least which have administrative tasks to perform or some jurisdiction to exercise over their members. If, for example, a specialized agency were to request an advisory opinion of the International Court upon the validity of a decision by its executive board, the Court might well be asked to hold that the doctrine of *détournement de pouvoir* is a general principle of law within the meaning of Article 38 (2) of the Statute of the Court.

We have then to determine first, the basis of the suggested definition of *détournement de pouvoir* and the reasons for regarding it as a general principle of law; and second, what kinds of action by organs of an international agency may be characterized as *détournements de pouvoir*.

The true subject-matter of *détournement de pouvoir* is discretionary power, not necessary function or required duty. While it is generally recognized as a form of excess of power, some legal systems go further than others in making it a separate ground for judicial intervention and control.[3] Thus, while the granted powers of public authorities are powers which may be exercised only for the ends contemplated in the grant (*principe de finalité*), a logical distinction can perhaps be made between action *ultra vires*, as action stretching a power beyond its proper limits, and *détournement de pouvoir*, as action taken within those limits but for an improper purpose. So German law, which appears to analyse these concepts furthest,[1] distinguishes between (1) action beyond the limit of defined powers (*Ermessensueberschreitung*) involving a violation of law, (2) the arbitrary exercise of a discretionary power, for example, by disregard of the rule of equality between the persons subject to public administration or of the principle of consistency with general usage (*Ermessenswillkur*), and (3) use of discretionary power for a purpose other than that intended by the grantor of the power (*Ermessensmissbrauch*). This last appears to be the true equivalent of the *détournement* of French, Belgian and Netherlands law. Italian court decisions, on the other hand, while formulating the notion of *détournement* in almost identical terms, appear to regard it simply as one of several manifestations of excess of power.[2]

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[1] A concise comparative study of the doctrine in the legal systems of France, Belgium, Luxembourg, the Netherlands, Italy and Germany is contained in the argument of Maurice Lagrange, Advocate-General of the European Coal and Steel Community, before its Court of Justice in the cases of *Assider* v. *Haute Autorité* and *Isa* v. *Haute Autorité* (Judgments given on 11 February 1955): see *Revue du droit public et de la science politique en France et à l'étranger*, 3 (1955), pp. 583–95.

[2] Article 33 (2) of the European Coal and Steel Community Treaty: 'Les entreprises ou les associations . . . peuvent former . . . un recours contre les décisions et recommandations individuelles les concernant ou . . . générales qu'elles estiment entachées de détournement de pouvoir à leur égard.'

[3] See footnote 2, above.

Since no breach of statutory provisions is necessarily involved in *détournement*, the test of it is whether the power has been used for an object other than that contemplated in the grant of the power,[3] this test involving in certain cases a scrutiny of the intentions of the administrator or agency concerned. From the instances of judicial control of *détournement*, two main forms of it may be derived:[4] first, where the administrator has exercised his discretionary power for a devious purpose; second, where he has acted in the exercise of this power against the principles of natural justice or, possibly, has simply acted unreasonably.

It is, of course, difficult to distinguish those elements in practice and Lord Halsbury did not attempt to do so in saying: 'When it is said that something is to be done within the discretion of the authorities . . . that something is to be done according to the rules of reason and justice, not according to private opinion . . . according to law and not humour',[5] and, as will be seen, it may be doubly difficult in the case of action by an international agency.

Nevertheless, an essential element in a devious purpose may be discerned, namely, bad faith, not in a moral sense but in the sense that the administrator has deliberately misdirected the exercise of his power and has achieved his object under the 'colour and pretence'[6] of achieving another. The English courts may investigate the action of the administrative authorities to see 'whether they have taken into account matters which they ought not to take into account or . . . have neglected to take into account matters which they ought to take into account';[7] or whether it is unreasonable or irresponsible,[8] and may so uncover such misdirection of the exercise of power.

The evolution of the 'substantial evidence' rule in the United States has followed similar lines.[9] There the courts scrutinize the rationale of the administrative decision and if there is evidence of fact, which a reasonable man would accept as adequate to support the decision, the courts will not interfere. Said Chief Justice Hughes:[1] 'The judicial inquiry goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.' Such agencies are conceived as being specially competent by reason of the experience of their members, the information available to them and the study they can give to the business and economic aspects of the problems falling to them for solution.[2] Nevertheless, the distribution of responsibility between such agencies and the courts for the determination of the questions of law and fact arising is difficult. In particular, a finding of fact may be necessary in order to determine whether the administrative authority may lawfully act at all.[3] This 'jurisdictional fact' is a mixture of law and fact which must be distinguished from facts found by the agency as a basis for its executive decision. As will be seen, this distinction, which is material to *détournement de pouvoir*, is particularly hard to make in the case of an international agency.

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[1] Lagrange, loc. cit., pp. 593, 594.

[2] Lagrange, loc. cit., p. 589. So Alibert: 'A y regarder de près, le détournement de pouvoir est une sorte d'incompétence.'

[3] Lagrange cites a passage from the decision of the Netherlands Supreme Court on the requisition of certain land, which expresses this concept very clearly: 'Que la question de savoir si dans un cas déterminé la réquisition concorde avec l'intérêt général est en effet soumise à l'appréciation de l'autorité requérante et que par conséquent elle est soustraite à l'appréciation du juge, mais que néanmoins le juge peut intervenir, si celui-ci devait constater que ladite autorité a clairement réquisitionné pour atteindre un objectif autre que celui pour lequel ce pouvoir lui a été donné.'

[4] See Griffith and Street, *Principles of Administrative Law* (1951), pp. 214–21.

[5] *Stoop* v. *Wakefield*, [1891] A.C. 173, at 179, cited by Griffith and Street, op. cit.

[6] See *Westminster Corporation* v. *London and North Western Railway Co.*, [1905] A.C. 426, per Lord Macnaghten at p. 432.

[7] Per Lord Greene in *Associated Provincial Picture Theatres Ltd.* v. *Wednesbury Corporation*, [1948] 1 K.B. 223.

[8] *Roberts* v. *Hopwood*, [1925] A.C. 578.

[9] See Schwartz, *American Administrative Law*, pp. 113–26.

In conclusion then, it may be said that rules for the judicial control of the exercise of discretionary power are sufficiently widely established for the following general principle of law to be recognized: Where a public administrator has a legislative grant of a discretionary power, an exercise of that power will be unlawful if it is deliberately aimed at an object not contemplated in the grant; in particular, if there are no facts which can be reasonably said to justify its exercise, that would be evidence of *détournement.*

II

How far can such a rule be applied to action by an international organization?

It is suggested that three conditions must be satisfied for an international organization to be held capable of *détournement de pouvoir*: first, it must have corporate personality; second, it must be able to take decisions binding upon its members by a majority vote;[4] and third, it must have direct responsibility for some area of international administration.

The first condition emerges from the fact that an alliance or conference of States, joined or met for a common purpose, is a bare association, having at most a contractual basis or, more often, no legal bond at all. An association of States is brought to a higher level of organization[5] when the States composing it establish an international agency with defined functions and objects, and such an organization is distinct from its members in three aspects: it is recognized as a legal person, having the capacity and authority to act, through its constituent organs, both on behalf of the totality of members[6] and also in regard to individual members; it is also the embodiment of the ideal policies and purposes defined and set out in the international agreement establishing it; and, finally, the representatives of its members, in conference or council assembled, and its staff, together form a structure designed to secure the achievement of those purposes. Such an organization then is an independent legal person, exercising a defined jurisdiction over its members to protect their rights and to enforce their obligations as set out in the international agreement creating it. In a sense, therefore, the organization may be said to have rights and duties to its members, and, conversely, its members towards it; and it is doubtful whether the rights and duties *inter se* of an international organization and its members can be reduced to purely contractual terms or be presumed not to exist in the absence of express provision in the founding agreement.[1]

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[1] *St. Joseph Stockyards Co.* v. *United States* (1936), 298 U.S. 38.

[2] See *Gray* v. *Powell* (1941), 314 U.S. 402, at 413.

[3] *White and Collins* v. *Minister of Health*, [1939] 2 K.B. 838 for Luxmoore L.J.: 'The court . . . must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends.'

[4] This note is confined to cases of exercise of power by an international organization, in so far as it affects one or more of its member States. Internal administration is not considered

[5] Compare the distinction drawn by Gierke between *foedera simplicia* and *systemata civitatum*: *Natural Law and the Theory of Society* (ed. by Barker), vol. i, p. 196.

[6] Compare Kelsen, *The Law of the United Nations*, p. 269: 'Acts of the [Security] Council, that is to say, acts performed in accordance with the rules of the Charter regulating the functions of the Security Council, are—as are the acts of any organ of the United Nations—to be imputed to the Organisation, not to its Members.' It is not wholly clear whether 'Members' here means

The second condition is closely tied to the first; for where an association of States, whatever the level of its organization, can act or take decisions only by the common consent of all its member States,[2] no misuse or misdirection of power to the detriment of a particular member is likely to arise since only the acts of the totality of members are valid.[3] Some form of majority rule has become the normal practice in contemporary international organizations,[4] and consequently it may come about that the representative or executive bodies of such an organization exercise their discretion in a manner thought to harm the interests or encroach on the rights of particular members, in so far as the decision exercising the discretion is constitutionally binding upon all. But, just as no majority of shareholders can purport to sanction what is *ultra vires* the company or commit a fraud upon the minority, so it is believed that the minority of member states of an international organization are entitled to protection against acts of the majority in excess of power.

It is here that the third condition enters in. An international organization, which has advisory or hortatory functions only will, even if it satisfies the first two conditions, seldom if ever take decisions which can be said to be acts of the organization inimical to the rights or interests of particular members: for the main tasks of such organizations is to make proposals and recommendations for action to member States. The action which may be the fruit of these recommendations is that of the States concerned and not of the organization. But where an international organization has been endowed by the States establishing it with authority to approve or disapprove courses of action by its members in the field which is its concern, to set conditions or limitations upon that action so that the purposes of the organization may be better served, to impose sanctions such as suspension of rights or expulsion from the organization, and to admit new members to it upon conditions, then the organization may be said to have direct administrative responsibilities.[5]

'Members of the U.N.' or 'Members of the Council'; but this is for the present discussion immaterial.

[1] Compare *Welton* v. *Saffrey*, [1897] A.C. 299, at 315, per Lord Herschell: 'It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any less, in my opinion, regulate their rights inter se. Such rights can only be enforced by or against a member through the company.'

[2] See, for example, *O.E.E.C. Convention*, Article 14: 'Unless the Organisation otherwise agrees for special cases, decisions shall be taken by the mutual agreement of all the members. . . .'

[3] Gierke, op. cit., p. 186.

[4] C. W. Jenks, 'Constitutional Problems of International Organisations', this *Year Book*, 22 (1945), pp. 34–36.

[5] See Hans Jurgen Schlochauer, *Der Rechtsschutz gegenüber der Tätigkeit internationaler und übernationaler Behörden*, p. 9, where the distinction is made between organizations authorized to

III

It is hardly possible to define exhaustively the class of actions by an international organization which might constitute *détournements*. But in the relations between an organization and its component States, it is believed that the following would be typical: actions or decisions by any organ which, though formally consistent with the provisions of the founding instrument of the organization, are designed (i) to accord unequal treatment to a particular member by diminishing its rights, or reducing or increasing its burdens as compared with the other members of the organization, or (ii) to alter generally relations of the members established in the founding instrument. Some examples may be taken to illustrate these cases.

In addition to Article 33 of the European Coal and Steel Community Treaty,[1] there are other provisions of that treaty conferring a discretionary power upon the high authority which might be capable of *détournement*. Thus Article 59 (4)[2] calls for an equitable distribution of coal and steel resources by the High Authority in cases of shortage where the Council has failed to agree unanimously upon the mode of allocation: 'equitably' seems here to mean having regard (1) to the comparative amounts devoted to exports and to the coal and steel industries in each member state and as between member states, and (2) to the need to make resources in short supply go as far as possible. Allocation based on other considerations or for other purposes would constitute *détournement*.

Again Article 60 (2) of the Treaty requires that further price schedules and conditions of sale applied by enterprises within the common market be published to the extent and in the form prescribed by the High Authority. By Decision No. 2/54 the High Authority ruled that publication of price variations was mandatory only in cases where the new price varied by more than 2½ per cent. from that published in the schedule for the particular product, and permitted an interval of one day between publication and effectiveness of the new price. The admitted object of this ruling was to prevent price maintenance arrangements between producers, and the High Authority argued against the objectors[3] that the ruling could be justified on the grounds (*a*) that publication was required only 'to the extent and in the form presented by' the High Authority, and (*b*) that Article 60 (1) empowered it to define pricing practices, which are contrary to Articles 2–4 of the Treaty, and that publication under Article 60 (2) was prescribed expressly 'for the above purposes', that is, definition of unfair pricing practices. The Court of Justice rejected this plea,[4] holding that the words of limitation 'to the extent and in the form prescribed' related only to the modalities of publication and did not authorize the High Authority to dispense with publication in particular cases or permit variations from the published price schedule; Article 60 (2) by implication required complete publication as a precondition of price variation. Though the admitted object of Decision No. 2/54 was one envisaged and approved in other provisions of the Treaty, the High Authority misdirected its discretion in seeking to attain that object by compromising the complete publicity for prices called for by Article 60 (2).

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advise and recommend only, and those having direct administrative responsibilities (*unmittelbare Verwaltungsfunktionen*).

[1] See above, p. 311, footnote 2.

[2] 'In all cases (of allocation of coal and steel resources), the High Authority, acting on the basis of studies undertaken jointly with the enterprises and their associations, shall be responsible for allocating equitably among enterprises the quantities earmarked for the industries under its jurisdiction.'

[3] The governments of France, Italy, and the enterprises A.S.S.I.D.E.R. and I.S.A.

[4] In *Gouvernement de la Republique Française* v. *Haute Autorité* (*Arrêt* of 21 December 1954).

It is conceded that Article 4 (1) of the United Nations Charter allows a margin of political appreciation by the Organization in exercising its 'judgment' upon applicant states. Nevertheless, this appreciation does not amount to an unlimited discretion; it is legally confined to those factors which are indicated in Article 4 (1) itself. To take other considerations into account would in effect entail a tacit imposition of new conditions, not necessary to or connected with the formation of the judgment called for by Article 4 (1).[1] The adoption of the principle that 'a Member of the United Nations is legally entitled to refuse to vote in favour of admission by reason of considerations foreign to the qualifications expressly laid down' in Article 4 (1)[2] would, it seems, not only lead to *détournements* by the Security Council and General Assembly of the powers conferred on them by Article 4, but could, if extended to international organizations generally, and to other matters requiring their decision, become a cloak for abuses. It could enable the majority of the members of an international organization to burden the admission of new members or the use of the organization's services or facilities by existing members with conditions or instructions which served not the agreed purposes of the organization, but the policies of the more powerful members, and so create an inequality of rights and obligations between members. Where the organization, acting through the voice of the constituted majority of members, has a discretion to impose a condition, that discretion must be exercised in the form and direction fixed by the purpose of the organization.

The establishment of the Interim Committee of the United Nations General Assembly in November 1947 was opposed by some members with arguments which were tantamount to saying that it was a *détournement* of the power to set up subsidiary organs under Article 22[3] of the Charter. It was suggested that this power was being used, not to establish a genuine subsidiary organ, but to enable the General Assembly to continue in virtually permanent session and encroach upon the functions and prerogatives of the Security Council and evade the rule of unanimity of its permanent members. The argument was specious. For the resolutions of the General Assembly establishing the Interim Committee not only preserved the authority of the Security Council in the most precise terms but, by making it a committee of the whole with a general duty to report back to the General Assembly, protected the rights of all members and even of those which refused to participate in its work.

IV

It is suggested in conclusion that an international organization may commit a *détournement de pouvoir* if in the exercise of a discretionary power (*a*) it imposes conditions upon any of its members which are not necessary or appropriate to achieve the object for which the power was granted, or (*b*) takes any administrative action which, though not forbidden by the founding instrument, is inconsistent with or outside the scope of the objects of the organization.

J. E. S. FAWCETT

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[1] See generally *Conditions of Admission of a State to Membership in the United Nations: I.C.J. Reports*, 1948, at pp. 62, 63.

[2] Adopted in Joint Dissenting Opinion in the same case: ibid., at pp. 92, 93.

[3] 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN A GERMAN COURT

I

ON 25 October 1956 the Federal Administrative Court (*Bundesverwaltungsgericht*) in Berlin, the highest German court in administrative matters, handed down a judgment which is of considerable importance as regards the application of the European Convention on Human Rights in German municipal law.[1]

The facts of the case were as follows:

The plaintiff, who held a Belgian passport, arrived in Germany in 1940 as a prisoner-of-war and has lived there ever since. Convicted in 1951 for indecent assault on a child and on an accompanying charge of homosexuality, he was sentenced to 8 months imprisonment. Part of this sentence was served while the remainder was conditionally remitted in January 1952.

Afterwards, on the ground of this conviction, the Land Authorities (*Landratsamt*) of Bad A— sought his expulsion from the country. They refrained, however, from taking this course because the plaintiff intended to marry a German woman and was at the time working as a labourer for a farmer who could not easily dispense with his services. Subsequently, a temporary residence permit valid until 15 February 1953 was granted to him and was later extended to 30 September 1953. In March 1953 the marriage took place. The wife already had two illegitimate children, of whom the plaintiff was not the father, one born in 1947 and the other in 1951. A child of the marriage was born in August 1953.

On 2 February the Land Authorities issued against the plaintiff an expulsion order and referred therein to his previous convictions. It based its action in principle on Article 5, para. 1, *b*, of the Police Ordinance of 22 August 1938 concerning aliens, according to which an alien can be forbidden to reside in the Federal Republic if he has been convicted for a crime or offence committed in that territory.

The plaintiff thereupon appealed to the Administrative courts of Bavaria, requesting the annulment of the expulsion order. The appeal was dismissed and he then appealed to the Federal Administrative Court in Berlin, which quashed the decision of the Bavarian courts and annulled the expulsion order. The conclusion of the Federal Administrative Court was that while Article 5, para. 1, *b*, of the Police Ordinance of 1938 concerning aliens still had the force of law, the power to apply the ordinance had been considerably restricted by Article 6 of the Constitution of the Federal Republic of Germany[1] and by Article 8 of the European Convention for the protection of Human Rights and Fundamental Freedoms.[2] The Court said:

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[1] Judgment of 25 October 1956, Nr. BVerwG. I.C. 58.56, published in *Deutsches Verwaltungsblatt* (1957), p. 57.

About the European Convention of Human Rights in general, see especially: C. Th. Eustathiades, 'La Convention européenne des droits de l'homme et le statut du conseil de l'Europe', in *Die Friedenswarte*, vol. 52, pp. 332–61, and vol. 53, pp. 47–69; P. Modinos, 'La Convention européenne des droits de l'homme', in *European Yearbook*, vol. i, pp. 141–72; and in *Europa Aeterna* (Zürich, 1957), vol. iii, pp. 140–5; D. P. Myers, 'The European Commission on Human Rights', in *American Journal of International Law*, 50 (1956), pp. 949–51; H. Rolin, 'Le Rôle du requérant dans la procédure prévue par la commission européenne des droits de l'homme', in *Revue hellénique de droit international* (1956), pp. 3–14; A. H. Robertson, 'The European Convention for the Protection of Human Rights', in this *Year Book*, 27 (1950), pp. 145–63; (1951), pp. 359–65 and (1952), pp. 452–4; A. Süsterhenn, 'Die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten', in *Deutsches Verwaltungsblatt* (1955), pp. 753–8.

> 'By virtue of these Articles, the family is under the special protection of the State. This means not only that the public authorities must take the necessary steps to safeguard the family both morally and culturally, but also that, in decisions like the present which leave some scope for discretion, due regard must be paid to the effect of the decision on the family in question. If the unity and integrity of the family are threatened, the interests of family protection must be taken into account and set against other public interests.
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> 'It is Article 8 of the Convention which shows how public interests should be assessed. According to this Article, everyone has the right to respect for his family life. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
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> 'It is beside the point, as the plaintiff states in his appeal, whether or not his Belgian nationality has become uncertain. Nor is it relevant to know the effect of the marriage on the nationality of his wife. The illegitimate children born to his wife before the marriage have in any case retained their German nationality and not acquired another nationality. Furthermore, it is improbable that these children will be readily accepted by another State, in view of the economic and personal circumstances of the plaintiff.
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> 'Should the expulsion order be put into effect, the wife will therefore be obliged either to follow her husband and part from the illegitimate children born to her before her marriage, who are still very young, or to part from her husband in order to remain with her children. It is probable, of course, that a way of reuniting the family will eventually be found, but, in view of the circumstances, the separation is likely to continue for some time.
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> 'The unity of the family will be compromised by this separation. It is true that he has no parental connection with the children born to his wife before the marriage, but the children must nevertheless be reckoned as belonging to his family, within the meaning of the above-mentioned provisions.
>
> 'Since, for these reasons, the expulsion order represented a serious threat to the plaintiff's family, it was necessary to consider whether the special conditions laid down in Article 8 of the Convention as a justification for such a threat were fulfilled.
>
> 'The facts of the case reveal that these conditions were not fulfilled. Although the serious offences committed by the plaintiff might seem to justify the expulsion order despite its adverse effect upon his family, the fact remains that he has had a good record since his convictions, and the offence committed at the time was not regarded by the authorities as sufficiently serious to call for his immediate expulsion on release from prison. . . .'

II

In reaching this decision, the Federal Administrative Court implicitly acknowledged that the provisions of Section I of the Convention, granting substantive rights, form part of German municipal law and are therefore to be applied by German tribunals.

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[1] 'Marriage and family shall be under the special protection of the State.'

[2] Published as Cmd. 8969; *United Kingdom Treaty Series*, No. 71 (1953).

Article 8: 'Everyone has the right to respect for his private and family life, his home and his correspondence.

'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The Court thereby endorsed the similar standpoint taken previously by other German tribunals in this matter.[1]

In the framework of the German legal system, the mere fact of ratification by Parliament of an international agreement does not necessarily imply that the provisions of the agreement are applicable by national tribunals. This is only so when the treaty is self-executing, that is to say when the provisions thereof are sufficiently precise to be applied without the need of special implementing laws or regulations.[2]

The provisions contained in Section I of the Convention undoubtedly fall within the self-executing category, and this for the following reasons. The recognized rights, and the restrictions which may be placed upon the exercise of such rights, are defined in great detail. Further, by virtue of Article 1,[3] every person within the jurisdiction of a High Contracting Party benefits *directly* and is entitled to recognition of the rights and freedoms specified in the Convention, which can be invoked before national tribunals.[4]

It may be of interest to compare the present wording of Article 1 of the Convention with the formula which was originally proposed in the draft prepared by the Consultative Assembly of the Council of Europe. This text provided that the High Contracting Parties should *undertake* to ensure to all persons residing within their territories the rights and freedoms enumerated in the Convention. Had this formula been adopted the legal effect of the Convention would perhaps have been confined to inter-State relations between the High Contracting Parties.[5]

The *travaux préparatoires* furnish another argument. At a certain point during the drafting of the Convention, there was a proposal for the insertion of a special clause according to which the legislatures of the member countries would ensure full effect to the provisions of the Convention in their own legal systems. This proposal was dropped, for the very reason that, in the absence of a specific provision to the contrary, each State acceding to the Convention would *ipso facto* give full effect thereto in its own legal system.[6]

The Federal Administrative Court did not deal with the question of the effect of the provisions of the Convention on German municipal law. This is, however, of the greatest importance. Under Article 59 of the Constitution, the legislature of the German Federal Republic approved and enacted the Convention of 7 August 1952. The Convention has therefore at least the force of a *federal law*.[7] As a federal law, the Convention takes precedence over all legal provisions of the *Länder*, whether enacted before or after promulgation of the Convention.

By virtue of the principle *lex posterior derogat legi priori*, it also takes precedence over all previous *federal* laws, with the exception of the Constitution itself. The Court therefore quite rightly examined the extent to which Article 5 of the 1938 Police

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[1] See judgment of the *Oberverwaltungsgericht* of Münster of 25 November 1955 in *Neue Juristische Wochenschrift* (1956), p. 1374.

[2] Cf. L. Preuss, 'On Amending the Treaty-making Power: A Comparative Study of the Problems of Self-executing Treaties', in *Michigan Law Review*, 51 (1953), p. 1117.

[3] Article 1 reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

[4] In the same sense: Süsterhenn, loc. cit., p. 754; Röling, in *Nederlands Juristenblad* (1956), p. 311; The Italian Senate, Doc. No. 79/4 of 4 December 1954, p. 3, and the Belgian Lower House, Doc. No. 223, II, of 3 February 1955, p. 10.

[5] This is brought out very clearly in the French text of the first draft, which reads as follows: '. . . les États membres *s'engageront* à assurer . . .' (*Draft Convention*, Article 2, Doc. 108 (1949) of the Consultative Assembly of the Council of Europe). The present wording of Article 1 of the Convention provides that 'Les Hautes Parties Contractantes *reconnaissent* à toute personne. . . '.

[6] See Conference of Senior Officials on Human Rights, *Report* (Doc. CM/WP 4 (50) 19), p. 12.

[7] Cf. W. Weber, in *Neumann, Nipperdey, Scheuner; Die Grundrechte*, vol. ii, p. 337.

Ordinance concerning aliens (under which the expulsion order for the plaintiff was made) was incompatible with Article 8 of the Convention, the latter being the law enacted subsequently.

From a purely legal point of view, however, it cannot be said that the provisions of the Convention invariably take precedence over federal laws enacted after the promulgation of the Convention if these laws are incompatible with the said provisions. But it may be assumed that the legislature will feel obliged to honour the engagement undertaken by ratifying the treaty and that the judge, in cases of conflict, will apply the treaty provisions on the assumption that the legislature did not intend to derogate from the international engagement.

This principle is applied in the French legal system[1] and has also been adopted in Germany by a decision of the German *Reichsgericht* of 23 November 1928.[2]

To ascertain the priority of treaty law over municipal law, a solution such as that which is to be found in the 1952 Amendments to the Constitution of the Netherlands would be preferable.[3] There a treaty, in so far as it has been published, is considered to be an independent source of law; it takes precedence over all national legislation and even the Constitution. For the Federal Republic, however, such provisions would only have full effect if the Federal Court of Constitutional Justice (*Bundesverfassungsgericht*) were competent to decide in conflicts between municipal law, on the one hand, and 'incorporated' international law, on the other.[4]

The Court's decision endorses the doctrine that 'everyone within the jurisdiction of a High Contracting Party' is a subject of the Convention. The Convention directly confers rights upon him *ex proprio vigore*, and these rights may be invoked by him before national tribunals. Nationality is irrelevant, for the wording in Article 1 of the Convention and in all other provisions of Section I is quite definite ('everyone has the right . . .', 'no-one shall . . .'). There is therefore, in this respect, a fundamental difference from the classical concept of diplomatic protection based on nationality.

The only restrictions on aliens admitted by the Convention concern political activity in the domain of freedom of expression and of peaceful assembly and, in connexion therewith, of the right of non-discrimination.[5]

The Court's decision is a valuable contribution to the interpretation of Article 8 as regards the right to 'respect for family life'. Article 8 goes back to a proposal of the Consultative Assembly and the reason for its insertion in the Convention is expressed in a passage of the Report of the Assembly's Legal Committee, which reads as follows:

> 'The inclusion in the list of guaranteed rights and freedoms of the "family" rights, which are represented by:
>
> (*a*) freedom from all arbitrary interference with family life;
> (*b*) the right to marry and to found a family;
> (*c*) the prior right of parents to choose the kind of education to be given to their children;
>
> raised, within the Committee, various objections based on the fact that in these cases no rights regarded as essential for the functioning of democratic institutions were at stake, so that it was preferable to exclude them from the guarantee and to limit the latter solely to those essential rights.
>
> This argument did not prevail, since the majority of the Committee thought that the

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[1] Cf. Mestre, in 'Les Traités et le droit interne'; Académie de Droit International, *Recueil des Cours*, 4 (1931), p. 237 et seq.

[2] In *Fontes juris gentium, Die Entscheidungen des deutschen Reichsgerichts* (1931), p. 15.

[3] See F. Duynstee, *Grondwetsherziening* (Deventer, 1953), Article 65.

[4] Cf. Verdross, *Völkerrecht* (3rd ed., 1955), p. 70.

[5] See Article 16 of the *Convention.*

racial restrictions on the right of marriage made by the totalitarian régimes, and the forced regimentation of children and young persons organized by these régimes, should be absolutely prohibited.'[1]

The proposal of the Consultative Assembly was accepted by the Committee of Ministers without further discussion and was finally included in the Convention.

Although the original reason for including a provision on the respect for family life was to protect the family from interference by a totalitarian régime, the Court has evidently given it a much more general application and has in this case held that:

'(i) the family in itself is worthy of protection;
(ii) the plaintiff's illegitimate children form part of the family to the respect for which he has a right by virtue of Article 8.

It is worth noticing that the Court did not consider it necessary to enter into the question as to whether the plaintiff stood in some relationship to his wife's illegitimate children, such as having custody of them. The fact of the mere *possibility* that the children might be separated from their mother, the wife of the plaintiff with whom they were living, was considered as an encroachment upon the plaintiff's right to respect for his family life.

This interpretation, far-reaching though it may be, does not, it is believed, run counter to the provisions of Article 8, for the simple reason that the precise meaning of the right is not expressly stated therein. The Court's decision can therefore be regarded as a contribution to the notion of the right to respect for family life.

It does not necessarily follow that the European Commission of Human Rights or, when it has been established, the European Court of Human Rights, will endorse this interpretation. Ultimately it is for these bodies to determine the meaning of Article 8, in which case their interpretation would probably be followed by national courts.[2] It could, however, be maintained, by analogy from Article 60 of the Convention,[3] that national tribunals are free to give a more liberal interpretation than that laid down by the European Commission or the European Court.

H. GOLSONG

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[1] Council of Europe, Consultative Assembly, Doc. 77 (1949), para. 9, p. 199.

[2] See Article 50 of the *Convention* which reads as follows: 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.'

[3] Article 60: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.'

THE TREATY POWER IN INDIA

An Apology

The Editor, at the request of Dr. R. B. Looper, draws attention to the fact that the Note under the above title by Dr. Looper in the previous number of this *Year Book* relied extensively on discussion of the subject by Professor Ramesh Chandra Ghosh in his interesting and valuable paper on the 'Impact of Treaty Implementation on Distribution of Powers' which appeared in Volume XV (1954) of the *Indian Journal of Political Science*, and that through inadvertence the Note did not contain any reference to Professor Ghosh's paper.

Dr. Looper desires to tender his apologies to Professor Ghosh for having failed to acknowledge at the time the debt which he owed to Professor Ghosh's paper as the source of the material on the treaty power in India which was the subject of his Note.

DECISIONS OF BRITISH COURTS DURING 1956–7 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. Public International Law

State immunity—Governmental trading organization having separate legal personality—Waiver

Case No. 1. *Baccus S.R.L.* v. *Servicio Nacional del Trigo*, [1957] 1 Q.B. 438 determines a point on which a tentative opinion was expressed by Cohen L.J. in *Krajina* v. *The Tass Agency and Another*, [1949] 2 All E.R. 274, namely, whether a governmental organization can claim sovereign immunity as a department of State even if it is a separate legal person distinct from the State itself.

Baccus S.R.L., an Italian Company, made two contracts for the purchase of rye from Servicio Nacional del Trigo, the organization whose precise status was the first issue in the case. Difficulties arose and Baccus commenced proceedings relying on a clause in the contracts that disputes should be submitted to the technical courts in London. An appearance was entered, a summons for an order to give security for costs was issued by the defendants and an order made on it by consent, but a year and a half after the entry of appearance, the defendants, who may conveniently be called Servicio, issued a summons asking that the proceedings be stayed and the writ set aside on the grounds that Servicio was a department of the State of Spain, and that the State of Spain claimed sovereign immunity. An order to this effect was made in chambers and Baccus brought the matter on appeal to the Court of Appeal.

The first question which arose was whether Servicio was in truth a department of State entitled to the benefit of the rules relating to sovereign immunity. Evidence on the relevant Spanish law was given which conflicted to a certain extent, but the view taken by Jenkins L.J. and Parker L.J. was that Servicio was so closely linked to the Spanish State that it was a department of State, unless the separate legal personality precluded it from being so regarded. On this last point—the kernel of the case in fact—they decided that it was within the power of a State to confer distinct legal personality on a department without thereby forfeiting the right to claim immunity and, although Servicio had separate legal personality, it was entitled to immunity. In this respect they went further than Cohen L.J. in *Krajina* v. *The Tass Agency*, [1949] 2 All E.R. 274 at p. 280, who suggested that the possession of distinct legal personality did not necessarily deprive an organization of the right to sovereign immunity, and they decided that Servicio was in fact entitled to that immunity.

The second question was whether the entry of an unconditional appearance or the issue of a summons for an order to give security for costs and the making of that order by consent amounted to a waiver of immunity. It appeared that these steps were taken on the instructions of the head of the Servicio without a full knowledge of the circumstances or consequences and without the knowledge of his superiors, whose authority to take or defend legal proceedings was necessary in Spanish practice. Relying on *The Jassy* [1906] P. 270 and *In re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139, they held that immunity had not been waived since waiver must be made with full knowledge of its consequences and with the full authority of the sovereign.

Singleton L.J. dissented on both points; he regarded the extension of sovereign immunity to cover distinct legal entities as a definite extension of the doctrine which was not required by international law; in this connexion he cited an American case, *Ulen & Co.* v. *Polish National Economic Bank*, 24 N.Y. 2d 201, as showing that there were other countries unwilling to make this extension. On the question of waiver, he held that since this was a trading entity and its authorities had power to carry out the ordinary functions of such bodies, appearance must be regarded as having been entered properly and that any immunity it possessed was thereby waived. Throughout his judgment Singleton L.J. seems to have felt that the dominating fact was that this was a commercial body trading and operating in the ordinary way but which was now seeking special privileges. It would be interesting to know what view he would have expressed on the hypothetical Ruritanian Navy Board incorporated as a separate entity referred to by Jenkins L.J. at p. 467. This attitude seems to have something in common with the theoretical basis of the distinction between acts *jure imperii* and acts *jure gestionis*.

An important question arising out of the case is what was the consideration regarded by Jenkins L.J. and Parker L.J. as determining whether a separate legal entity remained or did not remain entitled to the benefit of sovereign immunity. The essence of the view of the former seems to lie in the sentence at p. 466: 'Thus it seems to me that although their status was a corporate status, their functions were wholly those of a department of State.' He took those functions to be trading in grain in accordance with the directions of the Spanish Ministry of Agriculture and Spanish Government policy. This suggests, since he cannot have regarded the function of trading in grain as pre-eminently governmental, that he considered the extent of governmental control to be crucial. Parker L.J. adopted a slightly different approach, treating it apparently as a matter for evidence, that is, of foreign law and fact. He said at p. 472:

> 'The sole question, then is: are those admitted facts [sc. that it had corporate status] inconsistent with it being, as *prima facie* it is, a department of the State of Spain? Unless those facts make it inconsistent with that, the evidence of the ambassador has not been displaced. I see no ground for thinking that the mere constitution of a body as a legal personality . . . is wholly inconsistent with it remaining and being a department of State.'

He cited in this connexion the position of the Minister of Transport in this country. The intention of the foreign sovereign in setting up the body, to create a body which is to be an emanation of the sovereign or to create an ordinary trading organization, seems to be the real point and this is a point to be proved by evidence; one of the important elements in that evidence would naturally be the extent to which the sovereign or the Government had control or direction of the organization.

Meaning of 'Government' in Charter-party—Official view not conclusive

Case No. 2. *Luigi Monta of Genoa* v. *Cechofracht Co. Ltd.*, [1956] 2 Q.B. 552. The plaintiffs, an Italian company, were owners of a steamship, *S.S. Marilu*, registered in Italy and flying the Italian flag, which was chartered to the defendants, a Czechoslovakian company. By a clause incorporated by reference in the charter-party, it was provided that

> 'the ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destinations, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof or by any other government or any department thereof or any person acting or purporting to act with the authority of such government or of any department thereof . . . and if by reason of or in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and freight shall be payable accordingly.'

The vessel loaded in a North China port and sailed for Europe. Off the coast of China some days later she was stopped by a Chinese Nationalist warship. Armed guards were put on board and the ship was navigated by one of the soldiers to Quemoy. Subsequently the ship was ordered to go to Keelung, a port of Formosa, and the armed guard being still on board, she sailed there under the escort of a warship. At Keelung, after a few days, the master was informed by a senior officer that the ship would be discharged, and, the next day, a general came on board and said that he came from the Government of Formosa and that his Government had decided to discharge the vessel. After the ship had been discharged, it was allowed to leave Keelung in accordance with its owner's orders. It was found in the subsequent proceedings that throughout the period of nearly a month between the original stopping by the warship and the final release from Keelung, the master had at no time any real freedom of choice as to the movements or course of the vessel or the discharge of her cargo.

The shipowners claimed the balance of the freight in accordance with the clause quoted above and under the terms of the charter-party the dispute went to arbitration in London. The parties obtained from the Foreign Office statements to the effect that Her Majesty's Government had at all material times ceased to recognize the former Nationalist Government as either the *de jure* or *de facto* Government of the Republic of China and that Her Majesty's Government did not recognize that any government was located in Formosa in July and August 1953, the months during which the events under consideration occurred. The Italian Government recognized the authorities in Formosa as the *de jure* Government of China, as did also the United States Government. The umpire made his award in the form of a special case for the decision of the Court. In the proceedings, there were certain issues of a technical character on the construction of the charter-party and on the amount of freight due, and also a counterclaim was made by the charterers for the return of part of the freight already paid, but, since they are not of interest to those concerned with international law, they will not be discussed in this note.

It was *held* by Sellers J. that the clause was limited to action taken by a government which was a national government and not merely a municipal or provincial government. The only difficulty on the main issue in his view arose from the fact that the Foreign Office had stated that Her Majesty's Government did not recognize that any government was located in Formosa in July and August 1953. If the statement of the Foreign Office was not conclusive or exclusive of other evidence, there was ample support for that part of the award which held that the authority giving the orders or directions need not be a government recognized as such by Her Majesty's Government. The charterers, however, contended that the view of the Foreign Office was conclusive and in the judgment the two principal cases which had been relied upon by them, namely, *Duff Development Company Ltd.* v. *Government of Kelantan*, [1924] A.C. 797, and *White, Child and Beney* v. *Simmons*, (1922) 38 T.L.R. 616, were examined. The first was distinguished, as dealing with the very different question of sovereign immunity from jurisdiction, apparently on the ground that this immunity was based on international comity and on the need to avoid conflict between the actions of the Crown and the Courts. Presumably Sellers J. considered that no questions of comity arose in connexion with the placing of certain constructions by the Court on a commercial document, as distinct from the action by the Court itself against a sovereign. The second case the judge, referring to the judgment of Atkin, L.J. (reported only at (1922), 11 Ll.L.R. at p. 13), regarded as one where the unwillingness of the Foreign Office to give a clear opinion meant that the question was left to the Court to decide freely. Sellers J. held that the umpire was entitled to approach the case in the same manner as Goddard J. did in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co. Ltd.*, [1939] 2 K.B. 544, and to decide that the construction of a commercial document need not be governed by the view of Her Majesty's Government. After deciding the other points raised, Sellers J. upheld the award in favour of the shipowners.

This case is, therefore, an application of the principle of the *Kawasaki* case, which concerned the word 'war', to the word 'government', establishing that in the latter case also, when the word occurs in a commercial document, the official view of Her Majesty's Government is not decisive. It differs, however, from that case in one notable point. In the *Kawasaki* case, the Foreign Office statement deliberately avoided expressing a clear opinion on the point, and Sir Wilfrid Greene M.R. said: 'If His Majesty's Government had recognized that war had broken out it may be—and I say no more—that a statement to that effect by His Majesty's Government would be a matter which, even in dealing with a document of this kind, the Court would be bound to accept.' In the present case, the opinion of Her Majesty's Government was given clearly but the learned judge felt entitled to decide otherwise in the circumstances.

State Immunity—Conflicting claims to bank account in High Commissioner's name.

Case No. 3. *Nizam of Hyderabad and the State of Hyderabad* v. *Jung and Others*, [1957] 2 W.L.R. 217, arose out of competing claims to a sum of £1,007,940. 9*s*. 1*d*. standing to the credit of Rahimtoola, the third defendant, in the books of the Westminster Bank Ltd., which was the second defendant. In September 1948 this sum was the property of the Nizam of Hyderabad and stood in an account in his name at the Westminster Bank which Moin, as he was called in the judgments, together with Mir Jung who was not a party to the action, had power to operate. In the middle of that month, Moin went to Rahimtoola, who was then High Commissioner of Pakistan in London, and asked him to accept a transfer of the sum, to which he agreed on the express instructions of the then Foreign Minister of Pakistan, who was present at the meeting. On September 16th Moin wrote to the Westminster Bank and directed them to close the Nizam's account 'by transfer of the balance to the credit of Mr. Habib Ibrahim Rahimtoola, High Commissioner for Pakistan in London . . .'. The Bank carried out these instructions. Two days later a series of cables began to arrive asking that no withdrawals should be permitted from the account, and later the Government of India notified an interest in the money and the bank refused subsequently to deal with the account as Rahimtoola requested. The Nizam of Hyderabad and the State of Hyderabad in this action sued Moin, the Westminster Bank and Rahimtoola for the sum as money held in trust for the plaintiffs, money due and owing to them or money had and received to their use, and also claimed against Moin for its return as money paid away in breach of trust. The motion asked that the writ be set aside as against Rahimtoola and that all proceedings against the Bank be stayed, on the ground that the action impleaded the Government of Pakistan or sought to interfere with the right or interest of that Government in the sum in question.

Upjohn J. *held* that although the Government of Pakistan claimed no equitable interest, there was no evidence that the transfer to Rahimtoola was contrary to the instructions of the Nizam; the legal title vested in Rahimtoola was indistinguishable from a legal title vested in the Government itself and that this legal title would justify the submission that allowing the action to proceed would constitute impleading the Government. He therefore made the order which was sought.

At the hearing before the Court of Appeal, an affidavit by the Nizam was read, stating that the fund was transferred to Rahimtoola without the approval of the Nizam.

There were two judgments given in the Court of Appeal, one a joint judgment of Lord Evershed M.R. and Birkett L.J., and the other that of Romer L.J. The views of the latter, it is thought, did not substantially diverge from those of the other two Lords Justices.

The judgments approved as the general principle for the present case a proposition from Dicey's *Conflict of Laws*, 6th ed., p. 131: 'The Court . . . has no jurisdiction to entertain an action or proceeding against (1) any foreign sovereign. . . . Any action or proceeding against the property of (a foreign sovereign) is an action or proceeding against such person', which was quoted with approval by Lord Radcliffe in *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A.*, [1952] A.C. 582 at p. 616. But the argument turned primarily on the final words of the well-known *dictum* of Lord Atkin in *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] A.C. 485 at p. 490: 'The second (proposition) is that they [sc. the Courts] will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.' Secondly, it turned on the principle, laid down in *Juan Ysmael and Co. Inc.* v. *Indonesian Government*, [1955] A.C. 72, that a bare assertion of title will not found a claim to immunity if the title is manifestly defective.

The Court distinguished the *Dollfus Mieg* case, first on the ground that it related to chattels which must necessarily be in the possession of an agent, whereas the present property was a chose-in-action inherently incapable of possession (see *Haile Selassie* v. *Cable & Wireless Ltd.*, [1938] Ch. 839 at p. 847) and which could have been vested in the sovereign directly by putting the account in his name.

Title to the property could only be in the State of Pakistan if the High Commisioner was identified with the State, as Upjohn J. had held. In the Court of Appeal the opposite view was taken; in the words of Lord Evershed M.R. at p. 233: 'the transfer to him in, or by virtue of, his office as High Commissioner cannot be treated, in our judgment, as a transfer to one of the principal officers of the State which would so identify its holder with the State itself as to have made the vesting equivalent for all relevant purposes to a vesting in the State.'

The fact that the State of Pakistan did not claim or prove a beneficial title in the full sense of the term did not, however, dispose of the matter. It was submitted on behalf of Rahimtoola that the State of Pakistan through him had 'control' of the debt. While the majority was not entirely satisfied that Rahimtoola was agent for and responsible to the State in the matter, in view of their conclusion on the question of control, it was unnecessary to express a view on that point. Assuming he was merely the agent of the State of Pakistan the control held by the State could arise only from its right to give instructions to and call for the sum from its agent, Rahimtoola. Romer L.J. expressed doubts whether this remote interest ought to be regarded as 'property' within the rule as stated by Dicey. But the Court of Appeal unanimously agreed that, in the circumstances of the case, the submission that the State of Pakistan had control could not prevail. The rule that an agent was accountable only to his principal was subject to the exception that, if a payment is made to an agent under a mistake of fact or wrongfully, provided he has not already accounted to his principal or otherwise altered his position, a claim for recovery can be made against the agent (see *Buller* v. *Harrison*, (1777) 2 Cowp. 565). Since the Nizam had proved that the payment to Rahimtoola was wrongful, and the latter had not accounted to his principal, the State of Pakistan, before claims were made against him, the obligation to the Nizam overrode that owed to his principal. As the State of Pakistan had not shown even a 'scintilla of title', they were not impleaded by the action. To the submission that the question of title was an issue in the action but not relevant to the preliminary point, Lord Evershed M.R. in the majority judgment replied: 'If there were in truth a question of title to be determined, the matter might be otherwise.'

The judgments then went on to consider the submission that the Court has jurisdiction if a foreign sovereign was a bare trustee. The argument for this proposition rests on the judgment of Lord Langdale M.R. in *Duke of Brunswick* v. *King of Hanover*, (1844) 6 Beav. 1, 39. They gave no opinion on this point, which did not arise in view of their decision on the rest of the case but were inclined to share the doubts of Upjohn J. as to the accuracy of this suggestion. Finally, they did not have to decide whether the Bank was entitled to a stay of proceedings if the writ against Rahimtoola had been set aside.

One point of interest is that, even in the case of a chose-in-action which is inherently capable of being vested in the sovereign, i.e. by placing the account in his name, it might, in the view of the Court of Appeal, be effectively vested in the sovereign even if in the name of another person, provided that the person in question was, *per* Lord Evershed M.R. at p. 233: 'one of the principal officers of the State' or *per* Romer L.J. at p. 239: 'the alter ego of the State'. The latter suggested that this was a matter of evidence, and this view is not inconsistent with that taken in the judgment of the majority. In view of the diversity of constitutions it appears desirable not to exclude the possibility of the holding of money through a 'principal officer', rather than in the name of the Government or sovereign, and the precise status of the officer in question must be a matter of foreign law and fact.

Another line of inquiry prompted by the case is what is the nature of the 'control' by the foreign Government which is sufficient to found a claim to immunity. This expression derives from the speech of Lord Atkin in the *Cristina* case at p. 490; Lord Jowitt in the *Dollfus Mieg* case links these words with Lord Wright's *dictum* in the *Cristina* case at p. 507: 'It [sc. the rule of sovereign immunity] applies to cases where the sovereign has a lesser interest, which may be not merely not a proprietary but not even possessory.' The only instance given of 'control' by Lord Atkin is that arising under requisition, and he cites three cases, *The Broadmayne*, [1916] P. 64, *The Messicano*, (1916) 32 T.L.R. 519, *The Crimdon*, (1918) 35 T.L.R. 81. The first has the surprising feature that it did not relate to a foreign sovereign at all; in it the requisition was by the Crown under the prerogative; and it might have been expected to be considered to fall more within the field of Crown proceedings than sovereign immunity. In the second, the ship was requisitioned by the Italian Government; in the third, it was under charter to the U.S. Government. It is suggested that the last case may throw some light on the question. It is one of the characteristics of most charter-parties that they do not give possession to the charterers, and the same is true of some forms of requisition. But the sovereign has an obvious and substantial interest in the use and movements of the chartered or requisitioned ship and this ought to be protected, even if for technical reasons there is no possession by the Government. Interests under a charter-party have been in at least one respect assimilated to proprietary interests, that is, in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.*, [1926] A.C. 108, an admittedly contentious decision, and the development of the requisition of housing during and since the Second World War has established rights under requisition comparable in effect to proprietary rights. It may be that the system of possessory and proprietary rights is sufficient protection in relation to most types of property, and that the notion of 'control' is only necessary to give protection in connexion with ships and perhaps other closely analogous forms of property such as aircraft. It is true that Lord Jowitt in the *Dollfus Mieg* case at p. 604 denied that it was so limited and Lord Evershed M.R. in the present case at p. 231 considered that 'control' might well be relevant to a chose-in-action; but in fact the Court rejected the claim to 'control' because they considered it ill-founded in law by reason of a flaw in the *title* of the Government. The control here depended in fact on title and a flaw in the latter precluded a claim to 'control'.

The most important aspect of the case is, however, that evidence was admitted, admitted indeed at a late stage, which destroyed any claim of the Government of Pakistan, and the Government was precluded from invoking the doctrine of sovereign immunity to stop the case, since they failed to show a 'scintilla of title' or 'a question to be decided'. In this the decision follows *Juan Ysmael and Co. Inc.* v. *Indonesian Government*, [1955] A.C. 72. Governments, therefore, will in the future have to come forward with at least a case to argue, whether based on property, possession or control, whatever this last may mean, if they wish to claim sovereign immunity successfully.

A Panama Canal Zone port is a 'port in the United States' for the purposes of a clause in a bill of lading

Case No. 4. In *Stafford Allen & Sons, Ltd.* v. *Pacific Steam Navigation Co.*, [1956] 2 All E.R. 716, the question before Sellers J., whose judgment is reported only in *The Times* newspaper, 31 January 1956, and subsequently before the Court of Appeal, was whether the port of Cristobal in the Panama Canal Zone was 'a port in the United States'. It arose in connexion with a shipment of ipecacuanha roots owned by the plaintiffs from Cristobal to London on the defendant's ship. The relevant bill of lading contained a clause giving exemption to the shipowners from liability for negligence and also a clause paramount which read as follows:

> 'U.S.A.: With respect to shipments (other than live animals and deck cargo) from a port in the United States, all the terms and provisions of the Carriage of Goods by Sea Act, 1936, of the United States are to apply to the contract contained in this bill of lading.'

The goods were damaged in transit, and the owners claimed against the shipowners; the latter raised a preliminary point of law that, even if there was negligence, they were entitled to rely on the exemption clause, and it was this preliminary point of law which came before the courts. The owners of the goods argued that the clause paramount applied and that the United States Act thus incorporated rendered void the exemption clause. Sellers J. regarded the case as a matter of geographical fact 'accepted by America and recognised by our country and to be proved by high sources'. Since, however, neither the United States Government nor the Foreign Office made 'any pronouncement on the subject' (presumably Sellers J. meant that neither of these authorities had expressed any clear or unequivocal opinion on the issue as one of fact although a legal opinion of a counsel to the United States Department of State was before the Court), the matter must be decided as a question of United States law and of construction. He found great difficulty in deciding the question as a pure question of construction of the contract, but accepted the evidence of United States law, that the United States Act applied in the Canal Zone, and on this basis held that the clause paramount applied and that the owners of the goods were entitled to make their claim.

The Court of Appeal (Denning, Birkett and Parker L.JJ.) in their judgments approached the matter more directly as a pure question of construction. They pointed out that the parties must have intended to comply with the local law; and, since, on the evidence as to the local United States law, the United States Act did apply to such a shipment from Cristobal and did, in fact, make mandatory the inclusion of such a clause paramount as was included, they must have intended that Cristobal was a port in the United States for the purposes of the clause. The clause paramount therefore applied, the exemption clause was rendered void, and the judgment of Sellers J. was affirmed.

The status of the Panama Canal Zone which is regulated by Hay-Varilla Treaty signed by the representatives of the United States and Panama on 18 November 1903 has in the past caused difficulties between those two countries, particularly on the point as to where sovereignty lies. If such matters had here been in issue, the official view of the Foreign Office might well have been relevant, but in the circumstances the Court of Appeal did not regard them as arising and could resolve the matter by considering the terms of the bill of lading and the application of the United States law to which it referred.

H. G. DARWIN

B. PRIVATE INTERNATIONAL LAW

Domicil of a widow

Case No. 1. It has been said of a married woman's inability to have a domicil separate from that of her husband 'This incapacity, which has disappeared in the United States of America and in several Continental States, represents the last surviving relic in English law of the married woman's subjection to her husband.'[1] By the recent decision of Danckwerts J. in *In re Scullard, decd.*[2] one attempt to permit some of the bonds of this subjection to survive the death of the husband was thwarted. The husband was at all material times domiciled in England. The wife-testatrix left him in 1908 and never lived with him again. In 1946 or 1947, having resided in various places, she went to Guernsey with the object of being near her daughter. At that time she expressed an intention of residing in Guernsey until her death, and she in fact did so. Her personal property was moved to Guernsey; her realizable securities were sold and reinvested in Bearer Bonds or War Stock and taken to Guernsey; in 1949 she acquired a cottage there. She died in 1955, surviving her husband by about six weeks, but without having learnt of his death. She expressed no further intention during those six weeks of continuing to live permanently in Guernsey. There was medical evidence that until about two weeks before her death (i.e. about four weeks after her husband's death) she retained sufficient possession of her faculties to be capable of having and expressing an intention. On a summons to determine her domicil at death, Danckwerts J. said:

> 'I have come to the conclusion in the present case that the intention which the testatrix had in fact formed during her lifetime was only prevented by a rule of law relating

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[1] Cheshire, *Private International Law*, 5th ed., pp. 186-7. Cf. the somewhat cavalier rejection by the Private International Law Committee of the suggestion that a wife should be able to acquire a separate domicil in the same way as an unmarried woman; *First Report of the Private International Law Committee* (Cmd. 9068), p. 9.

[2] [1957] 1 Ch. 107.

> to the domicile of a wife from being effective in law; and I do not see why it should not be assumed that her intention continued after the death of her husband, and why one should come to the conclusion that some new overt act was required when all previous evidence is consistent with there having been no different intention during her life. Accordingly, in the present case I have come to the conclusion that the testatrix had an intention to acquire a domicile of choice in Guernsey and that that intention was effective in law.'[1]

This decision is in the tradition of that of Stirling J. in *In re Cooke's Trusts*.[2] Indeed, on its facts it goes slightly beyond the actual decision in that case. There the wife, believing her husband to be already dead, had in 1853 gone to New South Wales where she lived until her death in 1879. Her husband did not in fact die until 1877. It was held that she acquired a domicil of choice in New South Wales after his death. At this time she thought (correctly) that her husband was dead. Mrs. Scullard, on the other hand, never got to know of her husband's death. Such ignorance has now been found not to constitute an insuperable bar to the acquisition of a new domicil. This is so because the crucial question is whether or not the wife, after her husband was in fact dead, intended to reside permanently in Guernsey. The fact that she thought her husband to be still alive obviously does not preclude the formation of such an intention. It is therefore unfortunate that Danckwerts J. should have used the phrase: 'an intention to acquire a domicile of choice.'[3] The law does not require such an intention, nor does it regard such an intention as in itself enough, as the mental element involved in the acquisition of a domicil of choice. Moreover, ignorance of her husband's death would prevent Mrs. Scullard from properly supposing that she had acquired a new domicil. The learned judge at one point said: 'The whole matter, to some extent, is rather unreal, because, generally speaking, the question of domicil in its legal effects is not present to the mind of women in that position. All that they are thinking about is where they are going to spend the rest of their days, and where their permanent home is going to be.'[4] It is respectfully submitted that this unreality is unnecessary and stems from a confusion between the intention to acquire a domicil and the intention to reside permanently. It is the latter intention which is decisive. There is no necessity to attempt to investigate the existence of the former.

Danckwerts J. was able to distinguish the decision of Hodson J. (as he then was) in *In re Wallach*.[5] That case appears to give authority to the proposition contained in the sixth edition of Dicey's *Conflict of Laws* that 'A widow retains her late husband's last domicil until she changes it',[6] i.e. it is not liable to be automatically lost by operation of law upon the husband's death. Accepting this, the learned judge found in effect that after her husband's death Mrs. Scullard had an intention to reside permanently in Guernsey. She therefore acquired a domicil of choice there.

If Mr. Scullard had died, say, five weeks later than he in fact did, i.e. after Mrs. Scullard had ceased to be capable of forming or expressing an intention, the Court would have been faced with a more difficult problem. In the circumstances supposed, there would have been no moment at which Mrs. Scullard would have been both legally capable of acquiring an independent domicil and at the same time mentally capable of having the intention which the law requires for the acquisition of a domicil of choice. A narrow interpretation of the rule that a widow retains her late husband's last domicil until she changes it might then have prevented her acquisition of a Guernsey domicil.[7] Such a result could scarcely be regarded as satisfactory. The obviously most appropriate law to govern the distribution of the testatrix's movables would be excluded, because at the moment of her husband's death (an event her ignorance of which is admitted to be immaterial) she was no longer capable of having an intention which she clearly held up to the onset of this incapacity and which she never changed. Little comfort is derived from the fact that, if her domicil of origin had been in a third country, it might be the law of that country rather than the law of her husband's domicil which would have become applicable in these circumstances.[1] The *fons et origo mali* is the doctrine of the unity of domicil of husband and wife. But refinements such as those under discussion could be reduced by refusal to place too narrow an interpretation upon Dicey's Rule 11, sub-rule 2, that 'a widow retains her late husband's last domicile until she changes it'.

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[1] [1957] 1 Ch. 107, 117.

[2] (1887) 56 L.J. (Ch.) 637; 56 L.T. (N.S.) 737.

[3] [1957] 1 Ch. 107, 117. (Quoted above.)

[4] [1957] 1 Ch. 107, 116.

[5] (1950) 66 T.L.R. (Pt. I) 132; [1950] 1 All E.R. 199.

[6] At p. 111.

[7] The generally accepted doctrine, that a person of unsound mind retains the domicil which he had when he became so, would be consistent with this result.

The following passage from Halsbury's *Laws of England*, third edition, was also cited by Danckwerts J.

> '*Married Women*—A woman acquires the domicil of her husband on marriage, and during the existence of the marriage the domicil of the wife follows that of her husband. Even a decree of judicial separation does not render the wife capable of acquiring a separate domicil, for such a decree does not affect her status as wife. *The wife acquires the husband's domicil if she lives with him in the country of his domicil not only by construction of law but also as a matter of fact.* On dissolution of the marriage by the death of the husband, or by divorce *a vinculo*, the power of the wife to acquire a domicil for herself revives, and she is free again to exercise her own choice of domicil for herself and her infant children in her custody; but until she exercises this power her domicil remains that of her husband at the time the marriage was dissolved.'[2]

The last sentence of this passage reflects Dicey's sub-rule. The italicized words earlier in the passage suggest, however, that too narrow a construction should not be put upon that proposition. More particularly they suggest that in considering whether or not a widow has changed her domicil attention need not be confined to facts (such as, for example, change of residence, or formation or expression of an intention) taking place *after* the husband's death. But the rule as formulated by Dicey that 'a widow retains her late husband's domicil until she changes it' and the last sentence of the passage quoted from Halsbury (if taken out of its context) could both mean that to accomplish a change of domicil a widow must indulge in all the necessary factual activity *after* the marriage tie has been broken. It is to be noted that no authority is cited by the learned editors of Dicey's sixth edition for their proposition. It is to be noted, too, that the only authority cited for the last sentence in Halsbury, apart from *In re Wallach* (which was decided following the sixth edition of Dicey), is the old case of *Gout* v. *Zimmerman*.[3] The acceptance by Hodson J. in *In re Wallach* of the Dicey sub-rule was probably unnecessary for the decision. The husband died domiciled in England. He and his wife had been living there together up to the time of his death. The wife died only five days later, still resident there and apparently without showing any intention of going away. It would seem that on my view she would be domiciled in England at the time of her death. *Gout* v. *Zimmerman* was decided in 1847 in the Prerogative Court of Canterbury. This case simply does not support the strict interpretation of the proposition for which it is cited by Halsbury. Sir Herbert Jenner Fust said that 'the whole question for the Court to determine' was whether or not the widow of a man, who was domiciled in England at the time of his death, had subsequently become Dutch. As she had neither gone to Holland nor expressed any clear intention of doing so, it is scarcely surprising that the Court decided that she had not.

It is submitted that neither authority nor good sense requires the acceptance of the view that the shadow cast over a widow by the unity of domicil, which she had with her dead husband during his lifetime, should prevent the courts from attributing to her a different domicil after his death in circumstances in which they would do so if she were a spinster. To say crudely that 'a widow retains her late husband's last domicil until she changes it' could be interpreted as negativing this view. It is submitted therefore that the position could be more happily put on the following lines: Whereas until the moment of her husband's death (or of the termination of the marriage *inter vivos*) a woman is domiciled with him, from that moment onwards her domicil is determined in the same way as it would be determined if she was a spinster. This would mean that even if Mr. Scullard had died five weeks later than he in fact did, Mrs. Scullard would still have died domiciled in Guernsey.

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[1] It might be contended that although Mrs. Scullard would not have been able to form an intention after her husband's death to reside permanently in Guernsey, her residence out of England combined with the absence of an intention to return would have terminated her English domicil. See *dicta* of *Stirling J.* in *In re Cook's Trusts* (1887), 56 L.J. (Ch. 637; 56 L.T. (N.S.) 737.

[2] Halsbury's *Laws of England*, 3rd ed., vol. 7, p. 24, cited by Danckwerts J. [1957] 1 Ch. 107, 111–12 (italics supplied).

[3] (1847) 5, Notes of Cases, 440.

One practical reminder and one explanatory qualification should be added.

In practice, of course, wives usually acquire and retain during the marriage their husbands' domicil not only by operation of law but also *de facto*. The discussion is important only in cases where this is not so.

It is not suggested that upon the determination of the marriage a wife should *lose* her husband's domicil by automatic operation of law. It is not suggested, for instance, that her domicil of origin should revive, unless, of course, she happens *de facto* never to have lost it or to have re-acquired a domicil in that country. What is suggested is that she should *not retain* her dead husband's domicil by operation of law, if she has already obtained *de facto* a domicil of choice elsewhere.

Formal validity of marriage

Case No. 2. The decision of the Court of Appeal in *Taczanowska* (*orse. Roth*) v. *Taczanowski*[1] throws light upon several aspects of the law relating to the formal validity of marriages.

The parties were Polish nationals who went through a ceremony of marriage in Rome in 1946. The husband was an officer in the Polish 2nd Corps and was then serving in Italy in the course of his military duties. The ceremony was performed by a Polish army chaplain according to the rites of the Roman Catholic Church. In 1955 proceedings were instituted by the wife for a decree of nullity. Karminski J. held that the marriage was void for want of form.[2] The Court of Appeal (Hodson, Parker and Ormerod L.JJ.) was, however, able to uphold the marriage as a valid common law marriage.

Three matters are of particular interest.

(1) Hodson L.J. restated the applicability of the doctrine *locus regit actum* to questions of formal validity of marriage in these terms: 'so far as forms and ceremonies are concerned, the general rule is that where parties contract marriage in a country other than their own, they are taken to subject themselves to the law of that other country.'[3] In the instant case the marriage took place in Italy and it was conceded that the domestic law of Italy had not been complied with because the relevant articles of the civil code had not been read over to the parties by the officiating priest and the ceremony had not been registered in the Italian civil register. These facts were not, however, regarded as necessarily eliminating the possibility of the general rule having been complied with. It was noted that an Italian court would recognize a marriage such as the present one, provided it would be regarded as valid by the law of the common nationality, in this case Polish law. It was found that at the date of the marriage the Lublin Government had been recognized by Italy as the Government of Poland, and that, according to the Polish law which thus fell to be considered, the marriage would be invalid. What is of general interest, however, is that both Karminski J. and seemingly the Court of Appeal would have regarded validity by Polish law as sufficient to save the marriage notwithstanding its failure

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[1] [1957] 3 W.L.R. 141.

[2] [1956] 3 W.L.R. 935, *sub nom. Holdowanski* v. *Holdowanska* (*orse. Bialoszewska*) *and Price*; *Taczanowska* (*orse. Roth*) v. *Taczanowski* (*Krystek cited*).

[3] [1957] 3 W.L.R. 141, 144.

to satisfy the domestic requirements of the *lex loci celebrationis* as to form. The doctrine of *renvoi* is thus introduced into this branch of the law.

(2) One attempt made by counsel for the husband to save the marriage, notwithstanding its failure to comply with either Italian domestic or Italian conflicts law, involved reliance upon Section 22 of the Foreign Marriages Act of 1892. Karminski J. rejected this argument on the ground that neither party to the marriage was a British subject. The Court of Appeal, however, held that the applicability of Section 22 is not confined to marriages to which at least one party is a British subject. The preamble to that Act runs thus: 'An Act to consolidate Enactments relating to the Marriage of British Subjects outside the United Kingdom.' Section 1, which deals with marriages before a 'marriage officer', e.g. a British Ambassador, Governor, High Commissioner or Consul, is in terms concerned only with 'marriages between parties of whom one at least is a British subject'. Section 22, however, which 'declared that all marriages solemnised within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnised within the United Kingdom, with a due observance of all forms required by law', is not on its face limited to marriages to which at least one party is a British subject. Moreover, neither the enactment which it replaced,[1] nor the enactment which in 1947 replaced it,[2] contains any such limitation. The Court of Appeal had no doubt that the words of the preamble to the 1892 Act cannot create such a limitation. This is in accord with the view expressed by Dicey on the interpretation of Section 22,[3] and by the present editors of Dicey's sixth edition upon the interpretation of Section 2 of the Foreign Marriage Act, 1947 which has now replaced Section 22 of the 1892 Act.[4]

The Court, nevertheless, was unable to allow Section 22 to avail the husband in the present case because the Polish 2nd Corps was an independent command and the chaplain who performed the ceremony was not 'officiating under the orders of the commanding officer of a British army serving abroad'. It is to be noted that the Court of Appeal took this view[5] notwithstanding the facts that the Polish Corps in Italy was in 1946 supplied and paid through British military channels, that it was under the operational command of the Allied 8th Army, and that by the time of the marriage ceremony it had been disowned by the Polish Government.[6]

(3) The Court of Appeal (reversing the decision of the trial judge) upheld the marriage as being a valid common law marriage. The existence of such an exception to the operation of the rule *locus regit actum* in the law relating to formalities of marriage is well established. Some traditionally held views as to the basis and extent of this exception must, however, be drastically revised in the light of *Taczanowska* v. *Taczanowski*. Dr. Cheshire writes: 'The principle is that where compliance by a British subject with the local forms is impossible the marriage must conform to the requirements of the common law of England.'[7] Rule 168 in the sixth edition of Dicey's *Conflict of Laws* states that a marriage is valid for form *inter alia* 'if the marriage [being between British subjects] is celebrated as nearly as possible in accordance with the requirements of the English common law in a country where the use of the local form is impossible'.

It is immediately clear from the decision in *Taczanowska* v. *Taczanowski* that the exception is not confined to British subjects. Both parties were Poles. Hodson L.J. said in terms: 'The common law conception of marriage knows no distinction of race or nationality.'[1] The editors of Dicey point out that the older cases were all concerned with British subjects; but the use of square brackets in the Rule indicates a doubt and they suggest that it may be 'assumed that, when compliance with the local form is impossible, our courts will hold the marriages of foreigners valid, at any rate if held good by the law of the country where the foreigners are domiciled.'[2] However, the significance of the law of the domicil, so far as matters of form are concerned, was expressly denied by Hodson L.J. and Parker L.J. Parker L.J. said: 'In my judgement there is no authority or reason which requires us to look to any other law once the *lex loci* is inapplicable.'[3] Hodson L.J. is equally emphatic. It is now clearly established that formal validity by the law of the domicil is immaterial if the marriage is formally valid at common law: the fact that neither party is a British subject makes no difference. If the marriage is not good in form at common law, it would appear conversely that validity by the law of the domicil will not save it.[4]

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[1] 4 Geo. IV, c. 91, section 1.

[2] Foreign Marriage Act, 1947, section 2.

[3] Dicey, *Conflict of Laws*, 2nd ed., p. 623, quoted by Hodson L.J. at p. 146.

[4] Dicey, *Conflict of Laws*, 6th ed., p. 773.

[5] Karminski J. had inclined to this view, [1956] 3 W.L.R. 935, 944.

[6] Another attempt to establish the validity of the marriage upon a statutory basis was also rejected both by the trial judge and by the Court of Appeal. It was held that the powers conferred by the Allied Forces Act, 1940, s. 1(1), were properly exercisable only within the United Kingdom and nothing in the Polish Resettlement Act, 1947, enabled the Court to say that by English law this marriage should be held valid.

[7] Cheshire, *Private International Law*, 5th ed., p. 329.

The most striking feature of the Court's decision is its determination that testing the formal validity of foreign marriages by the common law is not limited to cases in which satisfaction of the local law would be impossible or even difficult. Indeed in the instant case satisfaction of Italian law would not have presented particular difficulty. The Court find the basis of the general rule, that the *lex loci celebrationis* governs formalities, to lie in the assumption that the parties are deemed to have subjected themselves to that law. This doctrine is supported by much of what Sir Edward Simpson said in *Scrimshire* v. *Scrimshire*.[5] The rule, upon this view of its *rationale*, should obviously not apply to the members of a conquering army in a conquered country. This was the position in the instant case.[6]

The Court of Appeal considered what constitutes a valid common law marriage. Most important, if not welcome, is its acceptance of the rule laid down in *R.* v. *Millis*[7] requiring the presence of an episcopally ordained clergyman. This case has not been followed in the Canadian courts;[8] it has been heavily criticized in the Ecclesiastical courts.[9] Moreover, it has been suggested[10] since *Wolfenden* v. *Wolfenden*[11] and *Isaac Penhas* v. *Tan Soo Eng*[12] that its operation is restricted to marriages celebrated in England or Ireland. The Court of Appeal has now shown this suggestion to be fallacious. Both Hodson and Parker L.JJ. expressly pointed out[13] that *Wolfenden* v. *Wolfenden* and *Isaac Penhas* v. *Tan Soo Eng* are not real exceptions to rule *locus regit actum*. It was the *lex loci celebrationis* that was applied in those cases, although part of the English common law had been incorporated into it. In the latter of these two cases the marriage was celebrated in Singapore, a British colony. In *Wolfenden* v. *Wolfenden* the marriage was celebrated in China: but English law was applicable by Order in Council. Even if sometimes the rigour of the rule in *R.* v. *Millis* may be avoided when it is practicable to regard the local law as having incorporated the common law (but as having with admirable selectivity excluded this awkward rule), it remains an incongruous survival. Its historical basis has been doubted[14] and it is apparently devoid of contemporary justification.

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[1] [1957] 3 W.L.R. 141, 151.

[2] Dicey, *Conflict of Laws*, 6th ed. at p. 772. As to the meaning of this passage see *Kochanski* v. *Kochanska*, [1957] 3 All E.R. 142, Case 3, footnote 6, below.

[3] [1957] 3 W.L.R. 141, 155.

[4] But see *Kochanski* v. *Kochanska*, [1957] 3 All E.R. 142, below.

[5] (1752) 2 Hag. Con. 395.

[6] Such marriages as, for example, that in *Pilinski* v. *Pilinska*, [1955] 1 W.L.R. 329, (noted this *Year Book*, 32 (1955–6), pp. 314–15) could perhaps have been saved on this principle.

[7] (1844) 10 Cl. & F. 534.

[8] *Breakey* v. *Breakey* 2 U.C. Q.B. 349.

[9] *Catterall* v. *Catterall*, (1847) 1 Robb. Ecc. 580.

[10] Dicey, *Conflict of Laws*, 6th ed., p. 770; Cheshire, *Private International Law*, 5th ed., pp. 331–2.

[11] [1946] P. 61.

[12] [1953] A.C. 304.

[13] [1957] 3 W.L.R. 141, *per* Hodson L.J. at p. 153 and *per* Parker L.J. at pp. 153–4.

[14] Dicey, *Conflict of Laws*, 6th ed., p. 770.

Case No. 3. In *Kochanski* v. *Kochanska*[1] Sachs J. has described *Taczanowska* v. *Taczanowski* [Case No. 2 above] as a 'highly important decision'. The learned judge accepted the principle laid down by the Court of Appeal in that case as being that the presumption that parties to a marriage ceremony have, so far as formalities are concerned, submitted themselves to the law of the place of celebration is rebuttable by evidence to the contrary. Once rebutted it is open to the court to apply the common law. The exception constituted by common law marriages to the rule *locus regit actum* is not therefore delimited in terms of particular categories of case, as, for example, situations in which compliance with the local form would not be reasonably possible, or situations where a party is a conqueror in occupation of a conquered country. The learned judge put the matter thus: 'Once, however, it is appreciated that in the case of such a marriage [i.e. one celebrated in a foreign country] an issue of fact can arise whether in the particular circumstances the presumption of subjection to local law has been rebutted, it ceases to matter whether the set of circumstances before the court happens to fall into a particular category that has already been the subject of a decision.'[2]

Kochanski v. *Kochanska* was concerned with the formal validity of a marriage between two Poles which had been performed in the British zone of Germany in 1945 in accordance with the rites of the Roman Catholic Church. The ceremony, which was performed by a Polish priest, had taken place in a German Church, but no attempt had been made to comply with local requirements as to form. At the time the parties to the marriage were living in Germany in a displaced persons camp for liberated Poles, who had set up a form of military organization there. They had placed themselves under the direction of the British forces and they refused to fraternize with the Germans. But they were no part of the occupation forces and lived as a separate community. In these circumstances Sachs J. found that the presumption of subjection to German law had been rebutted. 'Any presumption that the recently liberated members of this community had at the material time subjected themselves to the laws of a country that they then hated fervently and at whose violent hands they had suffered severely is, to my mind, clearly rebutted.'[3]

Sachs J. noted the need for caution before deciding that this presumption of subjection has been rebutted. It is scarcely likely that the courts will ever find that individuals can, merely by demonstrating a personal unwillingness to submit to the local law, avoid its requirements. But the learned judge did say: 'That caution may mean, however, in a specific case no more than that the exception to the general rule must be clearly established by evidence.'[4] It is respectfully submitted that this may be misleading unless the matter is viewed in a highly objective way. It is somewhat artificial to regard the task of the court as being simply to make a determination of fact according to the evidence. However clearly an individual may show that he did not in fact submit to the local law, the general rule may in many circumstances still operate. Indeed, Sachs J. expressly guarded himself against being thought to decide otherwise. It would seem that before the presumption is rebutted, not only should the party seeking to establish a valid common law marriage prove that at least one party did not in fact submit himself or herself to the local law, but he or she should also show that it would in all the circumstances be unreasonable to hold that that party ought to have done so. This of course would cast no doubt upon the correctness of the actual decision in *Kochanski* v. *Kochanska*.

Having found that the presumption of subjection to the *lex loci celebrationis* was rebutted, Sachs J. considered why the common law of England rather than the law which parties probably had in mind at the time of the marriage, namely, the law of their common domicil, should apply. The marriage under consideration was valid according to the law of the parties' Polish domicil. The judge actually based his decision upon its validity at common law. But he favoured the view that, in cases where compliance with the *lex loci celebrationis* is excused, the marriage should still be formally valid if so by either the common law or the law of the domicil.

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[1] [1957] 3 All E.R. 142.

[2] [1957] 3 All E.R. 142, 144-5.

[3] [1957] 3 All E.R. 142, 145.

[4] [1957] 3 All E.R. 142, 145.

In *Taczanowska* v. *Taczanowski* Hodson and Parker L.JJ. expressed the view that the law of the domicil has no applicability to questions of form.[1] Strictly speaking this was perhaps not part of the *ratio* of that case as there (unlike in the *Kochanski* case) the marriage was not formally valid by Polish law. Moreover, it is a little surprising that both the learned Lord Justices were apparently influenced by fear of the complications which would arise in cases in which the parties had differing pre-marriage domicils. It may perhaps be noted that such difficulties do not seem to have proved insuperable in the application of the dual domicil test to questions of essential validity. Also a somewhat analogous problem might be said to arise in a case where one party but not the other can be deemed to have subjected himself or herself to the local law. The answer to the latter problem seems to be that the *lex loci celebrationis* may be ousted if either party is deemed not to have subjected himself or herself to it. By a parity of reasoning, if it were permissible to rely upon the law of the domicil in order to give the marriage formal validity, satisfaction of both laws would be necessary in the event of the parties having different pre-marriage domicils.

Sachs J. said: 'Up to the time of the decision in the *Taczanowska* case it was commonly considered by those concerned with such matters in these courts, that where there was a foreign marriage in country A between two persons domiciled in country B, if the local law of A proved inapplicable then the court first turned to the law of country B to test the formal validity of the marriage.'[2] The arguments in favour of allowing, when the *lex loci celebrationis* is inapplicable, the *lex domicilii* to lend formal validity to a foreign marriage are based upon the desire to give effect to the reasonable expectations of the parties and upon considerations of international comity. The argument for exclusive reference to the common law is epitomized in the words of Hodson L.J. in *Taczanowska* v. *Taczanowski*: 'If it be said that since the parties are not British subjects, the common law of England does not apply to them, my answer is that such is the law *prima facie* to be administered in the courts of this country.'[3] Once the usual choice of law rule becomes inapplicable recourse is automatically had to the English common law. This reasoning assumes, however, that the choice of law rule *is* simply *locus regit actum*. As a matter of strict law the question is, it is hoped by Sachs J., still open. With this one would respectfully agree.

Maintenance orders and foreign divorces

Case No. 4. The central problem in the recent decision of the Court of Appeal (Lord Evershed M.R., Hodson and Ormerod L.JJ.) in *Wood* v. *Wood*[4] was as to the effect, if any, upon an English maintenance order of a divorce pronounced in the country of a couple's subsequently acquired foreign domicil. The Court of Appeal found that in the case before it an order was not automatically terminated by such a divorce, and, moreover, that in dealing with the order which had survived the dissolution of the marriage, an English court was not bound to discharge it but that it retained its discretionary power to vary it, discharge it or to allow it to continue unchanged.

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[1] [1957] 3 W.L.R. 141, *per* Hodson L.J. at p. 151 and *per* Parker L.J. at pp. 155–6. Ormerod L.J. did not deal specifically with the point.

[2] [1957] 3 All E.R. 142, 145. One of the texts cited by Sachs J. in support of this view is the following passage from the sixth edition of Dicey's *Conflict of Laws* at p. 772: 'It may, however, be assumed that, when compliance with the local form is impossible, our courts will hold the marriages of foreigners valid, at any rate if held good by the law of the country where the foreigners are domiciled.' The learned judge pointed out that this passage appeared in the first edition of Dicey's *Conflict of Laws* in 1896. It might be contended, however, having regard to the immediate context (which was the same in the first edition) of this passage, that it is referring to marriages valid according to English common law; and that the point of the passage is not to introduce the law of the domicil as an alternative, but to emphasize the applicability of the doctrine to foreign nationals at any rate if the marriage would in addition be valid by the law of the domicil. On this view of the meaning of the passage the qualification must of course now be eliminated since the *Taczanowska* decision.

[3] [1957] 3 W.L.R. 141, 151.

[4] [1957] 2 W.L.R. 826.

The facts were as follow. In 1950 a court of summary jurisdiction made an order for maintenance in favour of a wife on the ground of desertion. Her husband later acquired a domicil of choice in Nevada, and in 1954 he obtained a divorce from a Nevada court on the ground that he and his wife had in fact not lived together for three years. Thereafter the husband ceased to make the payments ordered in 1950. In 1956, when on a visit to England, he appeared at the magistrate's court on a warrant for arrears of maintenance. He applied to have the order discharged under Section 7 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that he was now divorced. He agreed to pay off the arrears by instalments and in fact did so. The wife applied to the same court for an increase in the sum payable on the ground that her ex-husband's circumstances had appreciably improved. The magistrate felt bound to recognize the Nevada decree as effectively dissolving the marriage; but, relying upon the principle laid down in *Bragg* v. *Bragg*[1] that an order for maintenance does not automatically lapse upon the determination of the marriage, he was still able to exercise the jurisdiction and discretion given to him under Section 7 of the 1895 Act. In exercise of this, he dismissed the husband's application for the order to be discharged, and upon the wife's application to vary he increased the sum payable. The husband appealed successfully to the Divisional Court.[2] The Court of Appeal restored the order of the magistrate.

The divorce was granted by a court in the country of the husband's domicil. At the time the wife knew nothing of the proceedings, notice of which was served by advertisement in a Las Vegas newspaper. 'The wife was in fact wholly unaware of the pendency of the husband's "complaint" to the Nevada court and it is clear that he did not expect or indeed intend that she would have any knowledge, until after the event, of that suit that he was bringing.'[3] The Court of Appeal, following *Boettcher* v. *Boettcher*[4] and *Igra* v. *Igra*,[5] held that such circumstances do not impede the effectiveness of an otherwise operative foreign decree in dissolving a marriage. Horridge J.'s *dicta* to the contrary in *Rudd* v. *Rudd*[6] are impliedly rejected. The general principle that an otherwise validly made foreign judgment may not be recognized in this country on the ground that it contravenes natural justice no doubt remains unimpaired. The Court of Appeal has, however, seemingly established that the mere fact that a husband, petitioning for divorce in the courts of his newly acquired domicil, deliberately takes no effective steps to bring the proceedings to the notice of his wife, who has been guilty of no matrimonial offence according to the only law of which she can realistically be assumed to know anything, does not, in itself, mean that natural justice has been sufficiently violated to justify the invocation of this principle.

The Summary Jurisdiction (Married Women) Act, 1895, Section 7, gives to courts of summary jurisdiction the discretionary power '. . . on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, [to] alter, vary, or discharge any . . . order'. A divisional court decided in *Bragg* v. *Bragg*, where the parties were British nationals domiciled in England, that a divorce decree made by an English court did not itself automatically discharge a maintenance order, notwithstanding the use in the section of the phrases 'the married woman' and 'her husband', and that the powers conferred upon magistrates by Section 7 survived unimpaired. The Court of Appeal in *Wood* v. *Wood* rejected the submission of counsel for the husband that this case was wrongly decided.

Counsel contended in the alternative that the *Bragg* doctrine was based upon the convenience of preserving in matrimonial proceedings, which are throughout within the competence of the English courts, the jurisdiction of those courts to grant maintenance both before and upon or after a divorce decree. It would thus be inapplicable to foreign divorce decrees. The Court rejected this contention, holding that the *Bragg* decision was based simply upon the proper interpretation of Section 7. It being found that the effect of the statute is to cause the maintenance order to survive the termination of the marriage status, it is clearly immaterial whether this termination has been brought about by an English decree or by a foreign decree which will be recognized in England. It follows, too, that the survival is equally effective whichever party instituted the proceedings for dissolution[1] and whatever the grounds upon which it was pronounced.

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[1] [1925] P. 20.

[2] [1956] 3 W.L.R. 889: for very pertinent comment on this, see Goodhart, 73 *L.Q.R.* 29.

[3] [1957] 2 W.L.R. 826, *per* Evershed M.R. at p. 832.

[4] [1949] W. N. 83.

[5] [1951] P. 404.

[6] [1924] P. 72. Contrast, too, Cheshire, *Private International Law*, 5th ed., p. 644.

On the other hand, the Court of Appeal emphasized that in the exercising of their discretion the magistrate should take into account amongst other factors the circumstance that the wife had not participated in the foreign proceedings and the circumstance that the divorce was granted on grounds inadequate by English domestic law. The Court found that in the instant case the magistrate had properly exercised his discretion.

It had been indicated by Collingwood J., delivering the judgment of the Divisional Court below,[2] that no exercise of the Court's discretionary power other than by way of a discharge of the original order would be consistent with the respect which comity requires should be paid to the judgment of a foreign court of competent jurisdiction. The order of the Nevada court included these words: '. . . It is ordered, adjudged and decreed that the bonds of matrimony heretofore and now existing between the plaintiff, Samuel Wood, and the defendant Cynthia Wood, be and the same are hereby dissolved and forever held for naught, and the said parties hereby released from all the obligations thereof and restored to the status of single persons.' The Court of Appeal came to the conclusion that the Nevada decree did not even purport to deal with the question of maintenance. The Master of the Rolls, having considered the views expressed in the American cases of *Estin* v. *Estin*[3] and *Vanderbilt* v. *Vanderbilt*[4] upon the effect of Nevada *ex parte* divorce decrees, concluded 'that whatever might be the intent as to future obligations marital (strictly so called) or otherwise, the Nevada court did not purport and could not have purported to override or "set at naught" the obligations and rights in England created by virtue of the Act of 1895 and the order made thereunder in 1950, of which the court knew nothing'.[5] Hodson L.J. said: 'there was no evidence that the Nevada court ever entertained, much less adjudicated upon, a claim for maintenance and there is no reason on this account why any discretion there may be to keep the order alive should not be exercised in favour of the wife.'[6] On this view of the Nevada decree it is indeed difficult to see that to permit the English maintenance order to survive involves a failure to afford the decree due respect.

It is interesting to consider what the position would have been had the husband been able to establish that the Nevada court had made an order which in its own eyes did alter the maintenance position. The judgments in *Wood* v. *Wood* do not appear to provide any guidance which is both unambiguous and unanimous on this point (which was not, of course, before the court).

It is to be noted that Lord Evershed said that '. . . the Nevada court did not purport and *could not* have purported to override or "set at naught" the obligations and rights in England created by virtue of the Act of 1895 . . .'.[7] The italicized words may suggest that if the foreign court had purported to do so, this could not affect the interpretation to be placed upon an English statute. At two places in his judgment the Master of the Rolls makes it clear that he would regard such an attempt upon the part of the foreign court to be no more than a matter to be taken into account by the magistrates when exercising their discretion. 'I do not, of course, doubt that the proved incidents of the foreign decree, so far as relevant to questions of maintenance (including convenience), will be matters proper to be taken into account in the exercise of the discretion'; and again, 'No doubt in the exercise of that discretion due regard should be had to the circumstances and incidents of the foreign decree and to the rights (if any) as to maintenance and otherwise which the decree may confer or involve, as also to the question of convenience of forum.'[1]

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[1] Save in cases in which a wife upon whose application the order was made is held to have committed adultery: for these cases express provision is made in Section 7 of the 1895 Act.

[2] [1956] 3 W.L.R. 887, 895.

[3] 334 U.S. 541.

[4] 1956 1 N.Y., 2nd, 342.

[5] [1957] 2 W.L.R. 826, 844.

[6] [1957] 2 W.L.R. 826, 848.

[7] [1957] 2 W.L.R. 826, 844 (italics supplied).

In the earlier case of *Mezger* v. *Mezger*[2] the marriage of parties domiciled in Germany had been dissolved by a German court. The parties had 'mutually recriminated' in the German proceedings, and the German court decided, adversely to the wife, the issue raised by her that the husband had failed properly to maintain her. Lord Evershed treated the decision of the Divisional court, that the magistrates in refusing to discharge a maintenance order had failed properly to exercise their discretion in this case, as being confined to its own facts.

Hodson L.J., on the other hand, took a different view. He said expressly: 'If the wife litigates the maintenance at the same time as the foreign divorce and fails, it is not to be expected that she will be permitted to relitigate the same question in the English courts. Such a case was *Mezger* v. *Mezger*, which in my opinion was rightly decided upon that ground.'[3] It will be noted too that, having observed that the Nevada court had not adjudicated upon a claim for maintenance, Hodson L.J. said 'there is no reason *on this account* why any discretion . . . should not be exercised in favour of the wife'.[4]

Ormerod L.J. did not consider the matter directly but it would seem that in reaching his decision he was influenced by the fact, and possibly geared it to the fact, that the Nevada court had not adjudicated upon any maintenance question.

There would seem to be nothing in any of the judgments in *Wood* v. *Wood* which lays down in terms that if the Nevada court had dealt with the question of maintenance this would automatically itself have terminated the English maintenance order. But Hodson L.J. and probably Ormerod L.J. do take the view, that in these circumstances the magistrate could not properly fail to discharge the order. Lord Evershed M.R. apparently would not regard the magistrate's discretion as necessarily being so restricted.

It is submitted with the greatest respect that the observations of the Master of the Rolls are to be preferred. A decision by the magistrate not to discharge a maintenance order notwithstanding the fact that a foreign court (admittedly competent to terminate a marriage tie) had purported to do so would, of course, involve some disrespect to the foreign court. So long as there is no universally agreed set of choice of law and recognition rules this sort of situation may be unavoidable. So far as the problem under discussion is concerned, it would seem to be both good law and good policy that an adjudication by the courts of the husband's domicil upon his wife's right to maintenance should not be recognized without possibility of question simply because the dissolution of the marriage which was the outcome of the same proceedings would itself be so recognized. As a matter of statute law there is no more in Section 7 of the 1895 Act to suggest that the power there conferred is curtailed if a foreign court in proper exercise of its divorce jurisdiction purports to adjudicate upon the question of maintenance than if such court does not purport so to adjudicate. As a matter of policy it is scarcely desirable that, regardless of the circumstances, an English court should in *all* cases be *compelled* to deprive a woman, resident and probably now domiciled in England, who has possibly committed no offence known to English law, of her rights and those of her children under a maintenance order, leaving her to obtain what relief (if any) the courts of a possibly distant country has decided to give her in proceedings of which she possibly and reasonably knew nothing.

Adoption

Case No. 5. In *In re Wilson*[5] Vaisey J. in 1954 decided that when the question of the efficacy of a foreign adoption order arises in the context of a problem of succession, it is the *lex successionis*, not the law of the adoption, that controls. That was a case of intestacy and the *lex successionis* was English law. At the time of the adoption, which was effected in Quebec, the adopted child was domiciled in Quebec. The adopting parents were, however, domiciled in England throughout. Vaisey J., applying English law *qua lex successionis*, decided that the adopted child was not entitled to succeed upon the adopting father's intestacy as his child. In the course of his judgment Vaisey J. said: '. . . if the testator had been domiciled in Quebec at the time when the infant defendant was adopted, the case of the latter would have been different and very much stronger.'[1]

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[1] [1957] 2 W.L.R. 826, 839 and 840.

[2] [1937] P. 19.

[3] [1957] 2 W.L.R. 826, 849–50.

[4] [1957] 2 W.L.R. 826, 848 (italics supplied).

[5] [1954] Ch. 733.

In *In re Wilby*[2] Barnard J. had to deal with a situation in all material respects apparently similar to that envisaged by Vaisey J. in this *dictum*. In *In re Wilby* an adopted child died intestate domiciled in England and an application for a grant of letters of administration to the estate was made by the adoptive mother. At the time of the adoption both the adoptive mother and the child were domiciled in Burma, and the adoption was made in accordance with the law of Burma. Barnard J. applied English law as the *lex successionis* and came to the conclusion that by English law an adopted child can only succeed upon intestacy if he or she is adopted by virtue of the provisions of the Adoption Act, 1950. He found accordingly that the adoptive mother was not entitled to succeed to the deceased's estate on the intestacy, and by implication he rejected the proposition put forward by Vaisey J. in the *dictum* quoted above.

In re Wilby, anyhow as a decision, could be authority for at least three alternative propositions.

It could mean that the *lex successionis* (whether English law or not) when applied to test the efficacy of an adoption must be taken to be the relevant domestic law. This is the least probable and (except to the most doctrinaire opponents of *renvoi*) least attractive interpretation of the decision.

Alternatively, it could mean English law will not recognize foreign adoptions. This would be tantamount to saying that England has no private international law of adoption. When evaluating the merits of such a proposition, it is perhaps pertinent to remember that foreign legitimations by subsequent marriage were recognized at a time when this doctrine was no part of English domestic law,[3] and that foreign legitimations by other methods still unknown to English domestic law, e.g. recognition, would apparently be recognized.[4] It is true that Barnard J. said in the course of his judgment: 'The adoption in this case would, no doubt, be recognised as valid in this country for some purposes, but what I have to decide is whether it entitles the adoptive mother to succeed to the deceased's estate on intestacy.'[5] On the other hand, the learned judge's unwillingness to give effect to the Burmese adoption in *In re Wilby* was based very largely on the fact that adoption covers a multitude of very differing situations. He said:

> 'I respectfully agree with Vaisey J.[6] that legitimation cases, as in *In re Goodman's Trusts*,[7] must be applied with extreme caution, if at all, for, in contrast to adoption, the meaning of legitimation is plain and unambiguous. Whereas adoption constitutes an artificial relationship, its conditions, its aims and its effect differ widely in the various countries and under the various types of civilization. In eastern Asia, for instance, adoption serves to maintain ancestor worship. Methods of adoption also vary greatly, and Wolff's *Private International Law*[8] gives some striking examples.
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> 'The adoption of the deceased on April 27, 1926, is in the form of an agreement between Mr. Skinner, the deceased's father, who was at that time a widower, and Mr. and Mrs. Wilby, whereby the former handed over the deceased to the latter, and

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[1] [1954] Ch. 733, 744.

[2] [1956] Ch. 174.

[3] E.g. in *In re Goodman's Trusts*, (1881), 17 Ch. D. 266, whereas legitimation by subsequent marriage was not introduced into English domestic law until January 1st 1927.

[4] This is assumed in *In re Luck's Settlement Trusts*, [1940] Ch. 864.

[5] [1956] P. 174, 179–180.

[6] [1954] Ch. 733, 740–1.

[7] (1881), 17 Ch.D. 266.

[8] 2nd ed., p. 398.

> resigned his rights and duties as a parent, which the latter accepted. This agreement was registered on the same date. There was no order of any court either confirming or approving this agreement, but none the less it constitutes a valid adoption by the law of Burma. . . .
>
> 'If I were to accede to this summons, it would have to be on the basis that the English courts recognized any foreign adoption, provided that the adopter and the adopted were domiciled in the country where the adoption was completed, for the purpose of succession to property under English law. For it could not, in my view, be left to a judge to grant or refuse such an application as I have before me, according to how close the law of adoption in such foreign country approximated to our law of adoption. Such a task would be an impossible one as Vaisey J. points out[1] in his judgment.'[2]

It is submitted with respect that, whatever the force of this argument, it is equally great or small regardless of the purpose for which the efficacy of the foreign adoption is being investigated. It is an argument which, if it proves anything, would prove it too often.

Thirdly, and more narrowly, the decision in *In re Wilby* may mean that when the English law is being applied *qua lex successionis* (and probably more narrowly still, *qua lex successionis* in intestacy cases)[3] it must, so far as testing the efficacy of an adoption is concerned, be taken to be English domestic law. Barnard J. stated that he must construe strictly the Administration of Estates Act, 1925, as amended by the Adoption Act, 1950. He found this necessity so compelling that he assumed that an adopted child cannot take upon an English intestacy unless he or she is adopted by virtue of the Adoption Act, 1950. The fact that the learned judge approached the matter in this way suggests that this third and narrow view should be taken of the effect of the decision.

On the other hand, as has already been pointed out, his references to the wide variety of so-called 'adoptions' and to the difficulty of deciding whether any particular one is properly characterized as an 'adoption' would form the basis of a wider *ratio decidendi.*

One may perhaps respectfully observe that mere difficulty of characterization, unless likely in practice to be frequent and insuperable, is not an attractive reason for the rejection of any rule. No one would contend that recognition should be given to a procedure simply because it is described as an adoption without further inquiry as to its true nature. But it is at least arguable that the fact that the word 'adoption' (or a translation of it) is loosely used in some legal systems of the world is scarcely in itself a justification for denying efficacy to other procedures which in form and effect are in all essentials similar to English adoptions.[4]

Torts

Case No. 6. *MacKinnon* v. *Iberia Shipping Company Limited*[5] raises two points of interest concerning choice of law rules in the private international law of tort. It seems to confirm a wide interpretation of the earlier Scots decisions in *Naftalin* v. *London, Midland and Scottish Railway Co.*[6] and *McElroy* v. *McAllister*,[7] and it provides an illustration of some of the difficulties involved in determining the *locus delicti* of torts committed on board ship. MacKinnon sued his employers for damages for personal injuries arising out of an accident in the engine-room of their Glasgow-registered ship, the S.S. *Baron Ramsay*, which occurred while the vessel was anchored in Dominican territorial waters.

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[1] [1954] Ch. 733, 741.

[2] [1956] P. 174, 179 and 180.

[3] The headnote in the Law Reports partially supports this interpretation. See *In re Fletcher*, [1949] Ch. 473, where foreign adopted children were allowed to take as children upon the true construction of a testamentary instrument.

[4] In the very recently reported decision of the Court of Appeal in *In re Marshall* [1957] 3 W.L.R. 538, Romer L.J., delivering the judgment of the Court, declined to rule upon the correctness of *In re Wilby.*

[5] [1955] S.C. 20; [1955] Scots L.T. 49.

[6] [1933] S.C. 259; [1933] Scots L.T. 193.

[7] [1949] S.C. 110; [1949] Scots L.T. 139.

He claimed both patrimonial loss and *solatium*. The First Division of the Inner House of the Court of Session (Lords Carmont, Russell and Sorn) upheld the Lord President (Migdale) in refusing to allow MacKinnon to claim *solatium* in the absence of adequate proof that this form of *iniuria* was recognized by Dominican law.

This decision gives full effect to the view expressed by Lord President Cooper in the course of his opinion in *McElroy* v. *McAllister* when he said that it was not only the question of actionability in the abstract which must be referred to the *lex loci delicti* but also the further question: 'On whom does the *lex loci delicti* confer a *jus actionis* and for what?'[1] *McElroy* v. *McAllister* was concerned with the materiality of the first part of this question: the instant case provides an illustration of the application of the second part. It will now be more difficult to argue that the rule in *Naftalin's* case, as applied in *McElroy* v. *McAllister*, should be limited to claims for *solatium* brought by someone other than the party who has been physically injured.[2]

It should, however, be pointed out that the merits and extent of this rule were not forcefully put before the Court, for counsel for the pursuer sought to argue that the rule did not apply to the facts of this case rather than to deny that the rule was wide enough to apply to claims for *solatium* for personal injuries. But Lord Russell considered it 'well-settled'[3] that the right to claim *solatium* (presumably in all cases) was a matter of substantive right and not merely a question of the measure of damage, although Lord Sorn merely 'assumed' that a claim for *solatium* is to be characterized 'as the assertion of a distinct right of action and not merely as something affecting the measure of damages.'[4] Lord Carmont gave no express opinion on the point. It therefore seems remotely possible, though scarcely probable, that the assumptions of the Inner House as to the scope of the rule in *Naftalin's* case are still open to reconsideration at a future date.

The second point raised by the case and the one with which the arguments and judgments were chiefly concerned is the definition of the *locus* of a tort wholly committed on board a British ship lying in foreign territorial waters. Counsel for the pursuer relied upon the Scots decision of Lord Blackburn in *Owners of the S.S. 'Reresby'* v. *Owners of the S.S. 'Cobetas'*[5] in arguing that the law of the littoral state was never applicable in such cases. The Court held that this case must, in view of the considerable authority ranged against it,[6] be considered as wrongly decided. The Court also refused to accept an interpretation of Section 265 of the Merchant Shipping Act, 1894,[7] which would extend it to cases other than those falling within Part II of that Act, Lord Carmont taking the view[8] that the Section was probably limited to conflicts between British laws, when the law of the port of registration is to be considered as the law of the flag.

The argument for the pursuer which received the most sympathetic treatment from the Court, and which is the most attractive from the point of view of common sense, was the suggestion that the distinction between internal and external acts which is recognized in relation to torts on the high seas[9] should be extended to acts committed in foreign waters.

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[1] [1949] S.C. 110, 135; [1949] Scots L.T. 139, 149.

[2] The suggestion that the right to *solatium* for personal injury is different in kind from the right to *solatium* for the death of a close relative was put forward by Professor D. M. Walker in (1955) 67 Jur. Rev. 213 et seq. In the second case the right to *solatium* is treated as a substantive right; in the first merely as a matter concerning the scope of the remedy.

[3] [1955] Scots L.T. 49, 56.

[4] [1955] Scots L.T. 49, 57.

[5] [1923] Scots L.T. 719.

[6] *The Halley* (1868) L.R. 2 P.C. 193; *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176; *The Arum* [1921] P. 12; *Yorke* v. *British and Continental Steamship Company Ltd.*, (1945) 78 Ll. L.R. 181.

[7] 'Where in any matter relating to a ship or to a person belonging to a ship there appear to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision the case shall be governed by the law of the port at which the ship is registered.'

[8] [1955] Scots L.T. 49, 55.

[9] See Dicey, *Conflict of Laws*, 6th ed., p. 805; Cheshire, *Private International Law*, 5th ed., p. 283.

The Court was prepared to accept the argument that there was little to interest the littoral state in an accident on board ship which had no consequences outside the vessel concerned. As Lord Sorn pertinently inquired: 'Did it contribute anything to the comity of nations that a Glasgow man, injured in the engine-room of a Glasgow ship whilst on a voyage, should have his rights determined by the law of San Domingo in an action raised in this country when he got home?'[1] Their Lordships were also prepared to recognize the possibly ridiculous results of applying the rule to all cases of accidents on board ships such as coastal steamers which were constantly passing in and out of territorial waters.

Ultimately, however, they were constrained by the weight of authority from following the dictates of common sense. The authorities relied upon[2] were, with one exception, cases which did not concern torts committed wholly within a ship and without any external consequences. *The Halley* and *The Arum* were both cases relating to collisions and it is at least arguable that *Carr* v. *Fracis Times & Co.* (an action for conversion of property on board a ship lying in the territorial waters of Muscat) concerned a tort with external implications. There the main issue before the Court was the validity of a defence of Act of State. This is in itself a further ground upon which the instant case may be distinguished since the defence of Act of State will be available in any area over which the State concerned has jurisdiction. It was not denied that the Dominican Republic had jurisdiction at the material time over the S.S. *Baron Ramsay*. The issue to be determined by the First Division was the scope of the choice of law rule to be employed by the Scots Court when that Court itself took jurisdiction over the matter.

The one authority which is not concerned with acts purely 'internal' to the ship is *Yorke* v. *The British and Continental Steamship Company* where the only reference to choice of law problems is an *obiter dictum* of Du Parcq L.J.[3] *Yorke's* case might well be distinguished from *McKinnon's* on its facts, since in the earlier case the ship concerned was anchored virtually permanently in Gibraltar harbour (she was described by Scott L.J. as 'almost a storehouse'[4]), whereas the S.S. *Baron Ramsay* was anchored off-shore.

It is true that none of these authorities provides any express authority for the distinction which counsel for the pursuer sought to establish, but neither do they provide any express authority to the contrary, and it is perhaps regrettable that the First Division should have considered itself bound to apply Dominican law as the *lex loci delicti* of a tort which could not seriously be said to have been of much interest to the Dominican Republic.

A second authority which was relied upon by counsel for the defenders and which was referred to by Lord Carmont in his judgment was *Chung Chi Cheung* v. *R.*[5] It was suggested that the proposition that 'internal' torts committed on board ship should be governed by the law of the flag revived the doctrine of 'extra-territoriality' excluded by that decision. As Lord Sorn pointed out,[6] this concerns the question of jurisdiction and not, as does the instant case, choice of law problems. There seems to have been some confusion throughout this case between the bases of jurisdiction and choice of law. While it may be true that the littoral state has jurisdiction over matters within its territorial waters, this does not necessarily lead to a choice of its law as the *lex loci delicti* when another state exercises jurisdiction over such matters. Nor, conversely, does the practice of littoral states in refraining from exercising jurisdiction over 'internal' matters in which they have no interest necessarily lead to the exclusion of their law as the *lex loci delicti*. But it provides evidence that events may occur in territorial waters without exciting the interest of the littoral state.

'Universal succession' to a corporation's contractual liabilities

Case No. 7. The facts in *Metliss* v. *National Bank of Greece and Athens S.A.*[7] were as follow. In 1927 the National Mortgage Bank of Greece (a company incorporated under Greek law) issued sterling mortgage bonds repayable as to principal in 1957, with interest thereon meanwhile. The bonds were guaranteed as to principal and interest by the National Bank of Greece (also a company incorporated under Greek law). In 1941 the payment of interest ceased. In 1949 the Greek Government declared a moratorium on all obligations on the bonds including any right of action. In 1953, by an Act of the Greek Government and by Greek royal decree, the National Bank of Greece (the guarantor bank) and a third bank, the National Bank of Athens, ceased to exist and were amalgamated into a new company the National Bank of Greece and Athens. It was enacted that this new company was the 'universal successor' to the rights and obligations of the amalgamated companies. In 1955 the National Mortgage Bank of Greece (the original debtor bank) made an offer to English bondholders that it should be guaranteed by the new company. The plaintiff, who was the holder of bearer bonds, did not accept this offer but brought an action in the High Court against the new company, claiming interest from 1941 to 1955 inclusive, on the ground it was the assignee and transferee of all the assets and liabilities of the guarantor bank, including its liability under the guarantee. Sellars J. awarded the plaintiff six years interest.[1] The learned judge found that the proper law of the contract was English law, and at the hearing of the defendant's appeal to the Court of Appeal this was conceded.

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[1] [1955] Scots L.T. 49, 58.

[2] See footnote 6, p. 342, above.

[3] (1945) 78 Ll. L.R. 181, 183.

[4] Ibid. 184.

[5] [1939] A.C. 160.

[6] [1955] Scots L.T. 49, 57.

[7] [1957] 2 Q.B. 33.

The Court of Appeal (Denning, Romer and Parker L.JJ.) affirmed the decision of Sellars J. Two points of law of particular interest were pronounced upon. The first concerns the significance of the amalgamation of the original guarantor company with the National Bank of Athens. The second concerns the unimportance of the Greek moratorium law.

The Court held that the plaintiff could sue the defendants although they were not party to the original guarantee. Although the proper law of the contract was English law, 'the status of a corporation, its creation, its dissolution, its amalgamation and succession are governed by the law of its incorporation'.[2] The defendant corporation was a Greek corporation and by Greek law it was 'universal successor' in the Roman law tradition to the National Bank of Greece and to the National Bank of Athens. Under this doctrine the new legal person or entity continues the personality of another or others. All rights and liabilities are transferred. The succession is *per universitatem* and not by a series of individual acts in respect of particular items. The effect in the instant case is that the English contract is in effect treated as if it had been made with the defendant bank as guarantor.

Denning L.J. said at the beginning of his judgment that:

> 'Notwithstanding that moratorium, if an English bond holder had brought an action in the English courts for the interest due to him, either against the principal debtor, the National Mortgage Bank of Greece, or against the guarantors, the National Bank of Greece, or against both, the English courts would without doubt have given judgment for the interest due. The English courts would not have recognised the moratorium. The proper law of the contract was English law and no enactment of the Government of Greece could affect the matter: see *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft.*[3]'[4]

Of course, this does not mean that an English court would have given judgment against the original guarantor after its existence had ceased to be recognized by Greek law. The principle upon which the Court decided that recognition should be given to the operation of 'universal succession' so far as the creation of the 'new' company is concerned would be logically applicable if considering the extinction or otherwise of the 'old' companies.[5]

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[1] *The Times* newspaper, 13 July 1956.

[2] *per* Denning L.J., [1957] 2 Q.B. 33, 46.

[3] [1939] 2 K.B. 678.

[4] [1957] 2 Q.B. 33, 40–41.

[5] Romer L.J. said at p. 48: 'If a foreign corporation is dissolved by its own domestic law "its existence as a juristic person ceases in the eyes of English law" and thereafter it cannot be sued here (Cheshire's *Private International Law*, 4th ed., p. 478). Accordingly the old Bank of Greece ceased for all relevant purposes to exist in 1953.'

It is, of course, well-established that the moratorium would present no obstacle to an action being brought in the English courts against the original debtor and/or the original guarantor. It was argued for the defendant in the instant case, however, that if the English courts recognize Greek law so as to make it liable as 'universal successor', so also they should recognize the Greek law of moratorium. They should not pick and choose between rules of Greek law. The court decisively rejected this argument. As Denning L.J. put it, 'The debtor is a Greek debtor but the debt is an English debt. When we are considering the personality of the debtor or succession to his personal effects, we must apply Greek law, because he is Greek; but when we are considering the amount of the debt and obligation to pay it, we must apply English law because it is an English debt.'[1]

The distinction between status and its incidents bristles with jurisprudential difficulties. The possibility of such difficulties presenting themselves in practical form may become very real if too wide or too ill-defined a scope is given to the operation of the law governing the position (to use a neutral word) of parties to a legal relationship (to use an equally neutral word) which relationship is itself governed by a different law. Such statements as that of Romer L.J. that 'the application of a foreign law to status does not involve applying the foreign law as to obligations'[2] have a deceptive simplicity. That in the instant case Greek law should determine questions relating to the existence and identity of Greek corporations is clear. If, however, the situation assumes the character of the transfer of obligations rather than the continuation of one legal entity, principle would not require that the efficacy of the transfer should necessarily be governed by Greek law. The way in which the situation is characterized cannot be determined by any logical test. It would be difficult to regard anything short of complete 'universal succession' as a matter of status.[3] Even this could be characterized as a matter of the transfer of *all* obligations and rights. The difference between this and the continuation of a legal entity is verbal rather than logical. The characterization chosen in a particular case can therefore be based only on policy. In the instant case Parker L.J. spoke of 'the balance of convenience'.[4] It was 'in the absence of some compelling reason to the contrary' that Romer L.J. took the view that 'one would suppose that on general principles of international comity, our courts would accord full recognition to these results, under Greek law, of the amalgamation of 1953'.[5] Romer L.J. and Parker L.J. were influenced by the factor of reciprocity in the instant type of situation.[6] All their lordships hint that if there had been evidence that creditors were being prejudiced the position might be different. It is submitted that the ultimate question is one of policy: To what extent should an English court allow a law, other than that regarded as most appropriate and so chosen to regulate the obligation generally, to determine the incidence of that obligation?

Effect of marriage upon movable property

Case No. 8. The difference of opinion between Dr. Cheshire[7] and the editors of the sixth edition of Dicey's *Conflict of Laws*[8] on the subject of the effect of marriage on movable property in the absence of a marriage settlement or contract was considered in the recent case of *In re Egerton's Will Trusts*[9] where Roxburgh J. accepted the view expressed in the sixth edition of Dicey. His lordship summed up his opinion in the following words: 'In my judgement, it is reasonably plain that there is a presumption that the law of the husband's domicile applies to a marriage, and that the presumption can be rebutted. It can certainly be rebutted by express contract, and, in my judgement, it could also be rebutted by what is loosely called a tacit contract, if the circumstances warrant the inference of such a tacit contract.'[1] In this case the testator's widow sought to have his property administered in *communauté des biens* under French law. The testator, whose pre-marriage domicil was English, married the widow in England in 1932. They settled permanently in France in 1934 and the testator died there in 1951. The widow made the following statement in an *affidavit* which was accepted by Roxburgh J. as evidence of the intention of the parties at the time of the marriage: 'Neither before nor at the time of my marriage to the testator, nor at any time afterwards, was there any decision or express agreement between us as to community or separation of property. It was however agreed between us before marriage that as soon as possible we would settle in France and establish our permanent and only home there. We carried this intention into effect, and neither of us ever had a permanent home outside France after the date of our marriage.' On the basis of this *affidavit* and other documentary evidence as to the couple's intentions with regard to their property Roxburgh J. held that, although there was evidence that the couple intended to settle in France 'as soon as possible', this was not sufficient evidence of a tacit agreement to submit their property to the law of France. In any event such evidence would not necessarily be conclusive.

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[1] [1956] 2 Q.B. 33, 46.

[2] Ibid. 54.

[3] See Parker L. J. at p. 53; also at p. 54: 'there is no room for any implication cutting down the type of liability transferred'.

[4] [1957] 2 Q.B. 33, 53.

[5] Ibid. 48.

[6] Companies Act, 1948, section 208, adopts a doctrine akin to 'universal succession'.

[7] *Private International Law*, 4th ed., pp. 491–4; see now 5th ed., pp. 503–5.

[8] Pp. 795–8.

[9] [1956] 1 Ch. 593.

In view of this finding it became necessary for the widow, if she wished the Court to apply French law to the distribution of her husband's property, to persuade it to follow the rule suggested by Dr. Cheshire that the effect of marriage on movable property should, in the absence of an agreement to the contrary, be governed by the law of the husband's pre-marriage domicil or, in the event of its being different, that of the intended matrimonial home.[2] It was argued on behalf of the widow that here the intended matrimonial home was France and that therefore French law should be applied. Roxburgh J., however, preferred the view put forward in the sixth edition of Dicey's *Conflict of Laws*, where the matter is said to be governed by the matrimonial domicil—i.e. the husband's actual domicil at the time of the marriage.[3] The matrimonial domicil, so defined, was in the instant case England. Roxburgh J. therefore applied English law.

Before doing so, the learned judge considered a further possibility, namely, the existence of a tacit marriage contract or settlement which might, in accordance with Sub-Rule 2 of Rule 170 of Dicey's *Conflict of Laws*,[4] oust the application of the law of the matrimonial domicil. His lordship held that, although the alteration of the husband's domicil immediately, or at least soon, after marriage *might* be evidence of such a tacit agreement to oust the law of the matrimonial domicil and to apply instead the law of the intended future domicil, the evidence in this case was insufficient to do so. The couple only intended to live in France 'as soon as possible' and did not in fact set up their permanent home there until some two years later. His lordship also considered evidence from documents relating to the purchase of property in France which negatived the suggestion that there was any intention that the matrimonial property should be governed by French law. In doing so, the learned judge refused to be limited, in his endeavours to investigate the existence of an agreement, to the consideration of evidence existing at the time of the marriage.

Since the reporting of this decision, the fifth edition of Dr. Cheshire's *Private International Law*, in which the case is discussed at some length, has been published. Dr. Cheshire interprets the judgment as laying down the proposition that the law of the husband's pre-marriage domicil is to be applied in the absence of an agreement between the parties, express or implied, to set up a matrimonial domicil elsewhere. In his view, the difference between Roxburgh J.'s decision and the views expounded in the fourth edition of his treatise is more apparent than real. He considers that it concerns the question whether or not the intention to set up a new matrimonial domicil must be of a contractual nature, express or implied.[5] But it is at least arguable that the contract, the possible existence of which was considered by Roxburgh J., was not a contract to establish a new domicil in France but a contract to subject all matrimonial property to the law of France. Indeed, it is not altogether clear that his lordship would have refused to imply an agreement to acquire a post-matrimonial domicil in France, although Dr. Cheshire suggests that it was just such a refusal which led him to apply English rather than French law to the administration of the testator's estate. His lordship put the following hypothetical case: an elderly widower with considerable property in England who, on marrying a young wife, decides to leave immediately for South Africa to set up a permanent home there. 'I cannot imagine,' said his lordship, 'that any court would ever draw the inference from the mere fact that they had decided immediately to leave for South Africa to make it their permanent home, and did so, that he intended that all his proprietary rights should, as from the date of their marriage, be governed by the law of South Africa.'[1] It seems clear from this that in the opinion of Roxburgh J. even a clear agreement to set up a matrimonial domicil elsewhere will not oust the law of the husband's pre-marriage domicil unless the court is willing to imply from it a tacit agreement not only to change the matrimonial domicil but also to apply the law of the new domicil to movable matrimonial property. On his lordship's view it may not even be necessary to change the matrimonial domicil at all, the incorporation into the agreement of any foreign law being sufficient if there is evidence to justify such an implication. The intention of the parties to change the matrimonial domicil is only evidence, and only one of the many possible kinds of evidence, of the agreement to place the matrimonial property under the law of a country other than that in which the husband was domiciled at the time of the marriage.

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[1] [1956] 1 Ch. 593, 607.

[2] Cheshire, *Private International Law*, 4th ed., p. 494; 5th ed., p. 502.

[3] 6th ed., p. 795, Rule 171.

[4] 6th ed., p. 793.

[5] Cheshire, *Private International Law*, 5th ed., p. 503, esp. n. 4.

It would seem therefore that the difference between the rule enunciated by Roxburgh J. and the view with which Dr. Cheshire's name has been associated is perhaps more clear-cut than Dr. Cheshire now suggests. The difference is not as to whether or not the common intention is of a contractual nature. It is rather as to the content of the intention. It is beyond dispute that the parties may by contract, express or implied, effectively agree to submit their property to a chosen law. What is disputed is the position in the absence of *such* a contract. Roxburgh J. has held that in these circumstances the *lex domicilii* of the husband applies. Dr. Cheshire's view is, however, that this may be replaced by the law of the country in which the parties at the time of the marriage intended to and in fact did set up their matrimonial home.

The primary aim in this part of the law should be to give effect to the agreed intention of the parties relating to their property. It is particularly important therefore that the courts should not be reluctant to imply a contract in appropriate cases. The problem is as to what should be done when it really is impossible on the facts to do this with any degree of confidence. It would seem that there is much to be said in favour of falling back upon the law of the country in which the couple had always intended to live and had in fact lived for the whole of their married lives, rather than upon the law of the country in which the husband was domiciled at the time of the marriage. This would not, it is submitted, involve the application of South African law in the hypothetical case put by Roxburgh J. and mentioned above. The Court might well come to the conclusion in such a case that there was a tacit agreement to submit the matter to English law.

It would seem, however, notwithstanding Dr. Cheshire's rationalization of the *Egerton* decision in the fifth edition of his treatise, that it is now open only to the Court of Appeal[2] to put the law on such a footing.

P. B. CARTER

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[1] [1956] Ch. 593, 605.

[2] It is perhaps a little surprising that Roxburgh J. did not place greater reliance on the decision of the Court of Appeal in *In re Martin* [1900] P. 211. That decision is not quite in point: moreover, the majority held that the husband had acquired a domicil in England before the marriage and he remained domiciled here for some time after the marriage. On any view therefore English law was the applicable law. There are, however, *dicta*, one of which is referred to by Roxburgh J., which support the learned judge's decision.

REVIEWS OF BOOKS

International Law Opinions. Selected and Annotated by LORD MCNAIR. Three volumes. Cambridge University Press. 1956. Volume I, xxv+380; Volume II, viii+415; Volume III, viii+436 (including Index—6 pages). £9. 9*s*. 0*d*.

Anyone who has undertaken to review these volumes must feel a sense of inadequacy for his task, tempered, on the other hand, by a feeling of great satisfaction that Lord McNair's *Œuvre magistrale* has at last appeared. It would not be correct to say that nothing of this kind has been attempted before, since for many years we have had the benefit of Professor H. A. Smith's *Great Britain and the Law of Nations*, one of the most significant British contributions to the literature of international law in this century, and, moreover, the first serious effort to open our eyes to the wealth of material buried in the Reports of the British Law Officers of the Crown, which for generations had remained undisturbed at the Public Record Office. We all owe a large debt to Professor Smith for his valuable volumes, and, although the grand design projected by him was never carried to a conclusion, his work drew attention to this rich source and stimulated other writers on international law to have recourse to it. His example began to make itself felt in articles and monographs appearing from the late thirties onwards, and all three of the Cambridge Studies in International Law which have so far been published have made full use of the Law Officers' Opinions on the subjects with which they deal. This has been all to the good, but it has increasingly been felt that this piecemeal distillation of the Opinions was no substitute for a comprehensive collection which would make available to international lawyers (so far as the present time-bar (1902) on the publication of Government archives allows) all the useful Opinions on every branch of international law. This great work has now seen the light of day at the hand of the *doyen* of British international lawyers.

The most important question which Lord McNair had to consider was the form the publication should take. His decision has been, in effect, to allow the Opinions to speak for themselves, but he has in many sections of the work written illuminating notes, and in the case of all the Opinions, or groups of Opinions, he has arranged them under rubrics which state concisely the principle involved and the effect of the Opinions. He quotes from the Preface to his book *The Law of Treaties*: 'I have not tried to pursue each incident to its conclusion and find out what happened. That would be diplomatic history, a field in which I have no experience and into which I should not dare to enter.' This is understandable, and, indeed, if the author had not set some limit to the scope of the work, its final appearance would have been indefinitely postponed. His note on sources is in itself a sufficient indication of the magnitude of the task he has accomplished. The present reviewer, who, in a small way, and for limited purposes, has had occasion to consult the Opinions, can testify to the immense time and labour consumed in the purely mechanical process of extracting the relevant material. In the archives there is no index of the legal points involved, and the alternatives are to read through the Opinions systematically or to ask for the papers concerning a particular incident about which an Opinion may have been sought. Most of the earlier Opinions are in manuscript, and although, as a rule, this is perfectly legible, it means a not inconsiderable addition to the burden of compilation. The whole work, from beginning to end, bears the clearest stamp of Lord McNair's own hand and there could be no greater guarantee of its scholarship.

In the Preface Lord McNair points out the importance of the Opinions. He deplores the suppression of the office of the Queen's Advocate or King's Advocate, who, until the last holder of the office retired in 1872 (Sir Travers Twiss) was legal adviser to the Crown on (*inter alia*) matters pertaining to the law of nations. It was a necessary qualification for the office that the holder should be a civilian and a member of Doctor's Commons. Few will quarrel with Lord McNair's view that the science of international law in England suffered greatly by the disappearance of this office, and it may be that the prestige of the subject, at least at the Bar, would have proved much greater if there had continued to be practitioners of such high standing who had continued to specialize in it. Certain it is, for example, that the First World War would not have overtaken a Bench and Bar totally unequipped and ill-informed on questions of Prize Law. No doubt the creation of a permanent post of Legal Adviser to the Foreign Office at the beginning of this century meant that the functions formerly performed by the Queen's Advocate were taken over by equally specialized jurists, and these able men have made notable contributions to the literature of international law which it is needless to mention here in detail. Nevertheless, the fact remains that they are civil servants and are more limited in their power to exercise influence on the education and outlook of the Bar with regard to international law than the active practitioner.

As Lord McNair remarks, 'the opinions given to the Crown form another source of international law'. Undoubtedly the contents of these three volumes provide supplementary and sometimes corrective material to the textbook writer and should afford the International Court of Justice with yet another valuable 'subsidiary source' as indicated in Article 38 of its Statute. The author says 'No State alone can make law', but it is a fact that in the field of international law the influence of the English-speaking nations has been predominant. The very first Opinion in the book is that of the King's Advocate in 1764, dealing with the succession to the Crown of the Two Sicilies and the refusal of the then King of the Two Sicilies to recognize the Treaty of 1667 concerning British commercial privileges in Naples and Sicily. The Opinion affirms the principle that treaties are not merely personal compacts but impose obligations upon the State as a continuing entity, irrespective of changes in government. Almost a trite doctrine one might suppose: yet, as late as this century, modern governments have had to reassert it against, for example, the Soviet Government and on many other occasions. 'On this point' (states the Opinion we are quoting) 'the Law of Nations is founded upon the great reason of things, the utility of all nations.' This comment, so typically English, illustrates the common sense (which in this context means the instinct for the *reason* behind a rule, and an apprehension that such a reason exists—that the rule is not just arbitrary) which characterizes the sort of contribution that Great Britain has made, and will, it is to be hoped, continue to make, to the law of nations. It is not a question of blowing our own trumpet, since it must freely be admitted that French logic, for example, and American moral fervour have each in their sphere an analogous role to play. Yet the fact that there can be such a specific and important British contribution has frequently in the past been completely ignored by the English Bar, who, generally speaking, have tended so far to misunderstand the nature of international law as to regard it either as a collection of maxims chiefly of Roman Law origin or as a speculative system constructed by professors in their cloisters. Welcome signs have appeared of late that this attitude is dying and it is to be hoped that these volumes may assist in accelerating the process. It is only fair to add that there have been outstanding examples of counsel who, after many years of ordinary legal practice completely unrelated to international law, have been obliged, as Law Officers of the Crown, to enter that field and who, bringing to their task the kind of experience and the kind of legal method which is the 'genius of the common law', have made an important contribution to international law. It would be invidious to list names, but that of the late Lord Finlay can scarcely divide opinion in this respect. Nor has this specifically British contribution been confined to practising members of the Bar, as the examples of Westlake and Hall abundantly show. Lord McNair has been concerned particularly to emphasize the part played by the English civilians, and, indeed, there have been so many eminent names amongst them since the days of Sir Leoline Jenkins that the roll is an impressive one. On the other hand, does not the author himself really belong to the common law, rather than the civilian tradition, and have not his writings (and, it may be added, those of the late James Leslie Brierly) been strongly marked by that influence with highly beneficial and permanent results to the advancement of the law of nations? Not only this, but there cannot be left out of account his personal influence, direct and indirect, upon students originally reared under the civilian tradition, and who through him acquired, and transmitted to a wider sphere, many of the most valuable elements in the common law tradition. Of these the most eminent today occupies a seat on the International Court of Justice.

Some (especially on the Continent) may feel tempted to compare these three volumes to Hackworth's *Digest*, but they will be mistaken. It is not at all the same kind of work. In the first place it is not an official publication. It is a work of individual scholarship, a tremendous argument in itself for the view that, despite the strenuous conditions of the modern world, such individual scholarship has an essential task to perform. Lord McNair has in these three volumes achieved far more than a 'team' of workers could have done, acting under common direction but with only an artificial and pre-conceived aim in view. He has, moreover, done the job in an unbelievably short time; if we had waited for a work of this type from a team we should be still waiting. Secondly, we have here, not just the Opinions themselves, but valuable rubrics introducing them, written by an author who brings to his task a lifetime of study, a lifetime of practical experience in every sphere of international organization, and nearly a decade as Judge of the International Court of Justice—not to mention much else. Fortunate are we indeed that the British Opinions have been presented to the world by so notable an authority at the height of his powers.

Now to turn to the work itself. The first two volumes are devoted to topics usually comprised under the law of peace, and the third to war and neutrality, giving special attention to Anglo-American relations, particularly during the American Civil War. Section I of the first volume deals with 'The Personality of the State and its relation to its Head or Government'. One of the most delicate questions involving the relation of the common law to international law has been that of the protection afforded to the persons and reputations of foreign monarchs. The position of diplomatic envoys led to difficulties in this respect which the Act of Anne attempted to resolve, but, apart from some vague fragments of common law about seditious libel, the extent to which there is an 'international duty' as regards foreign monarchs has, so far as possible, been tactfully evaded. The Opinions collected in this Section display a fine combination of liberalism and common sense. Take, for example, the complaint by the Turkish Ambassador concerning some remarks in a daily newspaper in June 1896 (*à propos* of the massacre of the Armenian Christians by the Turks). This is dealt with quite simply by the Law Officers saying that 'having regard to the fact that the publication is in English and took place in England, that a jury would come to the conclusion that the paragraph is rather a very forcible expression of the abhorrence which the writer appears to entertain for the Sultan rather than a serious incitement to murder', the Officers conclude that although 'these paragraphs are undoubtedly in the worst possible taste ... [they] do not think that any proceedings can be taken upon them with reasonable prospect of success'. These remarks appear to combine a proper respect for the sovereignty of a foreign Head of State with a decent regard for the liberty of the individual. It was unfortunate that this point of view appeared to have been lost sight of in the years immediately preceding the Second World War when the heads of totalitarian régimes were demanding the deletion of far less offensive material from the British Press. The volume continues by dealing with composite States, dependent States, and backward communities. This section contains much material which would have made a great deal of difference to those pages of somewhat arid and unrealistic discussion about Personal Unions, Real Unions, &c., which occupy so much space in the classical textbooks. The fact that these Opinions cannot now, for the most part, be of direct practical value in no way detracts from their fascinating historical interest. Those, however, which concern the status of States protected by the United Kingdom (although these too have practically disappeared) form an illuminating background to the principles acted upon by the Foreign Office in returning certificates to the courts where such States have been involved in legal proceedings.

The section which follows (on the independence and immunities of States) contains Opinions which bring out quite clearly the obligation of foreign instrumentalities enjoying immunities on the territory of the State (such as diplomatic envoys, armed forces, &c.) to respect the local laws. There is reproduced here for the first time a coherent account of the Sun Yat Sen affair, a matter rather superficially treated in the textbooks, chiefly because the exact official attitude has hitherto not been distinctly explained. The dispatch from the Foreign Office to our Minister in China brings out the interesting point that Sun Yat Sen was a dual national (being a British subject as well as Chinese), a fact not generally appreciated, though it did not affect the real issue which was not that of protection but of the rights of a foreign legation. At any rate the somewhat unsatisfactory account given of the affair in Satow[1] is now completed.

Most of the Law Officers' Reports on the subject of recognition, which is the next heading in this volume, have been published by Professor H. A. Smith in his *Great Britain and the Law of Nations*, and by Judge Sir Hersch Lauterpacht in his *Recognition in International Law*. Lord McNair has not taken up space in reproducing what is easily accessible elsewhere. In a few brief but pregnant remarks he permits us a glimpse of his own estimate of a subject which has produced a torrent of literature over the last twenty or thirty years without, it is to be feared, contributing much to its stabilization. He observes (perhaps a little drily): 'The paucity of the Reports printed in this section is a reminder that the question whether to grant or not to grant recognition is mainly one of policy, not of law; questions of what constitutes recognition, and of the effects of recognition are more legal.' On the more practical legal questions connected with recognition—whether premature recognition of a new State or government may be a wrong against the old State or government, whether there is ever a legal 'right' to recognition, and whether recognition is constitutive or declaratory—on these matters, he tells us, scarcely any material exists, and consequently, it may be concluded, few useful conclusions can be drawn so far as the British material is concerned. Section V covers 'Succession' and here again Lord McNair has been conservative in his selection. He states: 'The British Government has approached questions of succession in a somewhat tentative and empirical manner, appearing to hold the view that only a very small part of the field is covered by generally recognized rules of law.' This is certainly borne out by the Opinions reproduced by him in this Section: they avoid any broad generalizations and deal strictly with the facts under review. At the same time it must be pointed out that the most recent of the Opinions is dated 1900, that apart from textbook writers there was little suggestion during the nineteenth century of any international obligations with respect to succession, and that, so far as contemporary State practice was concerned, Keith was not far wrong in his summation of the law at the beginning of this century. Much of the development of the law in this field took place after the First World War, and, although it is still very far from settled, as Lord McNair says, 'certain principles appear to be emerging' (see *passim* O'Connell *The Law of State Succession* (1956)). It is somewhat startling, however, to find so little of interest in the archives on the subject.

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[1] *A Guide to Diplomatic Practice*, 3rd ed., 1932, p. 203.

Section VI contains Opinions concerning diplomatic agents, consuls and commercial agents. Whilst the practice of the United Kingdom with regard to diplomatic agents is fairly well known, the Opinions give a valuable picture of how this practice has developed, and there is a useful rubric on 'Taxes, Rates and Customs Duties', a subject upon which the practice of this country is rarely explained satisfactorily in the textbooks. The Opinions about consuls and commercial agents also cover a field which the books usually deal with in terms of generalities, and which is here brought to life with concrete examples.

Section VII is entitled 'Treaties', but Lord McNair explains that he has included it merely *pro forma* since the second edition of his book on *The Law of Treaties* will contain such fresh material as he has collected since the publication (in 1938) of that work.

Section VIII entitled 'High Seas' contains, as one might expect, some of the most interesting and copious material in the first volume. It runs to some fifty pages and the Opinions cover the topics of the legal status of the high seas, visit and search, the *Costa Rica Packet* case, hot pursuit, the maritime flag, the bed of the sea, sedentary fisheries and piracy. Here we may venture to express the view that the touch of the Law Officers is surer, their advice more positive, than in most spheres of international law in which they were called upon to state their opinion. This was a sphere, at any rate during the nineteenth century (within which period most of the Opinions fall), in which Great Britain's pre-eminence as a maritime Power gave authority to her views on the law of the sea. Not only this, but she was in the unusual position, which scarcely prevailed in the same degree in relation to other spheres, of being able to enforce that law and thereby ensure respect for it by other nations. Small wonder, therefore, that the Opinions in this section have a directness and vigour not so apparent in those relating to other branches of international law. The Opinion of John Dodson of 1836, in which he advised His Majesty's Government to protest against the Russian ukase purporting to exclude all foreign ships from approaching within 100 miles of the Aleutian Islands, shows some embarrassment regarding the British 'Hovering Acts' (which, however, he distinguishes on the ground that they were not applicable to 'vessels purely and altogether foreign') but contains a categorical assertion of the three-mile limit: 'I have, however, no hesitation in saying that a mere Municipal Law authorizing in general terms the capture of Foreign Vessels which have not approached within three miles of the coast is inconsistent with the law of nations.' Opinion after Opinion on divers aspects of the law of the sea are equally positive: 'Every State possesses the right of searching the merchant vessels of another State within its own ports' (a right which it became necessary in recent years for the United Kingdom to reaffirm in most formal terms against the Polish Government in the *Eisler*[1] affair), 'but the right of visitation and search upon the high seas does not exist unless specifically conceded by treaty' (Dodson's Opinion, in another connexion, 18 June 1836). Or again (advising with regard to the use made by American ships of the ports and fisheries of Western Australia): 'By the law of nations the inhabitants of every country have the exclusive right of fishing within three miles of the low-water mark upon their coast, and within the bays and harbours thereof, unless the subjects of other States have by treaty or immemorial usage acquired the right to fish therein' (Dodson, 26 January 1841). 'No general right of search of foreign ships can be claimed by any nation not a belligerent' (Harding, 25 October 1854). The incident of the *Cagliari*, which is the subject of four lengthy and interesting Opinions, illustrates the principle that cases of 'vehement' suspicion of piracy constituted, in the British view, an exception, in the interest of order on the high seas, to the normal immunity from visit and search in time of peace. This exception, said the Attorney-General (Fitzroy Kelly), was admitted by the usage of States 'with the most jealous reluctance'. The resolute opposition to the claims of the United States to the whole of the Behring Sea as *mare clausum* (on the advice given on 20 August 1887 by Edward Clarke and Richard Webster) marks the firmness with which Great Britain maintained her position with regard to the three-mile limit. An interesting Opinion by the same Law Officers dated 2 May 1890 laid down the principle that when a foreign ship outside territorial waters sends boats into territorial waters which commit offences there (in this case illegal fishing in Russian waters by British boats operating from a British ship), the mother ship is liable to seizure. As the Russian Government stated on another occasion: 'If it were otherwise a schooner could with impunity pursue seals on the coasts by sending her boats there, and thus infringe the inviolability of territorial waters, although herself remaining outside such waters.' In the view of the British Law Officers this was only common sense.

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[1] See this *Year Book*, 26 (1949), p. 468.

The troublesome affair of the *Costa Rica Packet*[1] receives here its final illumination. It appears clear that the Law Officers were most reluctant to endorse the exaggerated claims made on behalf of Carpenter, that the facts were as elusive then as they appeared to be in the accounts which later emerged in the textbooks, and that the Law Officers did not admit 'any supposed right of Her Majesty's Government to question, in the case of British subjects, the sufficiency or expediency of the system of criminal law adopted by a friendly nation for the governance, within its dominions, of all persons alike'. Naturally they had in mind claims to be treated, so far as procedure, &c., was concerned, in the same manner as if the case had been tried in England; they did not reject the doctrine of 'denial of justice', but this was not in issue. The whole business was a storm in a teacup and it is to be hoped the modern student may be allowed to forget it in favour of more soundly based and better-reasoned precedents. The remaining portions of Section VIII deal briefly with hot pursuit and the maritime flag, on both of which there is disappointingly scant material, followed by some interesting Opinions on sedentary fisheries. The Section concludes with four lengthy Opinions about the *Huascar*, another incident which is now at last fully documented.

Section IX covers 'State Territory, its acquisition and loss: Rivers, Canals and Islands'. The most interesting items in this Section are the Opinions on the status of the Royal Niger Company, and the effect of treaties entered into by the company with local potentates, an Opinion concerning loss of territory by abandonment (*à propos* of the Falkland Islands; most of the material about this and about the Dependencies has already been published and the author does not reproduce it), and a very illuminating series of Opinions regarding the Island of Trinidad (South Atlantic). A controversy arose with respect to the latter when the British Government, towards the end of the last century, took possession of the island for the purpose of using it as a landing-place for a submarine telegraph cable from Cape de Verde Islands by Ascension to Montevideo—a project of the utmost commercial and political importance, since the end in view was to establish telegraphic communication between Europe and South America without passing through Brazil (whose Government were proposing to take over compulsorily certain cables already laid off its coasts and thereby acquire a monopoly which would put other nations at their mercy). A dispute arose between Brazil and Great Britain regarding the latter's title to the island which the British Government founded on the contention that the island was uninhabited and did not belong to any other Power. The Brazilian claim appears to have been based on acts performed by Portugal in relation to the island in the previous century, of which she claimed the benefit as successor to Portugal. The Opinions on the territorial aspects of the dispute are well reasoned; however, the most interesting passage in the papers does not relate to these aspects, but to the question how far it is legitimate to press the claims of sovereignty (even if well founded) against the common interests of humanity. This passage occurs, not in the Law Officer's Opinion, but in Lord Salisbury's dispatch of 15 November 1895, and, as we so often, in the last decade, have heard the outraged cry of 'sovereignty' when States have been asked to conform their conduct to the general interest, it is refreshing to read what he said. After stating that the island was the 'only spot of the earth which can be used as a landing-place for a telegraphic cable south of the Equator crossing the Atlantic from the Old World to the New', Lord Salisbury continued: 'Where, by natural conditions, the commodity and interests of vast populations depend upon a spot of the earth's surface being put to the use for which it has a special and singular aptitude, it is straining the right of sovereignty very far to say that the owners of this spot of earth shall have the right to declare that under no conditions shall it be put to that use, and to withdraw it from the service of mankind.' The British Government were prepared to withdraw all territorial claims to the island subject to the Brazilian Government guaranteeing the free application of the island to telegraphic purposes. They were even prepared to submit the dispute to arbitration. Lord McNair does not record what became of this offer or the later history of the matter.

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[1] Martens, *Nouveau Recueil Général*, 2nd series, vol. 23, pp. 48, 715 and 808.

Volume I comes to a close with Section X ('Territorial and National Waters including Fisheries'). Most of the material in this field, so far as British practice and the Law Officers' Opinions are concerned, has already been made available in Volume II of Professor H. A. Smith's *Great Britain and the Law of Nations*, and some further material became public in the course of the *Anglo-Norwegian Fisheries* case. The Opinions reproduced by Lord McNair serve mainly to underline the persistence with which this country has upheld (and herself adhered to) the three-mile limit, and the importance she has attached to having a fixed limit at all. Apart from noting with interest the view expressed by Webster and Finlay, in 1898, that, with regard to bays, 'there is no general rule as to a width of ten miles', the present reviewer has found the most unusual Opinion in this section to be that arising out of the operation of the British trawlers off the coast of Iceland. This contains some valuable observations on the subject of the regulation by the local State of the right of innocent passage through its territorial waters. The Icelandic Fisheries Law of 1894 contained two provisions which provoked an outcry amongst the fishing community in this country. First, it was provided that fishing by means of trawls was prohibited within the territorial waters of Iceland; secondly, a fishing vessel found within those waters with a trawl on board, although not engaged in fishing, was liable to heavy penalties unless the ship was seeking harbour in distress. As regards the first point Her Majesty's Government declined to make representations, holding the view that 'the right of a country to prohibit foreigners from fishing in its waters and to make regulations for the police of those waters was generally recognised, and that diplomatic representations could only be made in the event of penalties for a disregard of such prohibition or regulations being absolutely of an unreasonable character'. As regads the second point, the Danish Government (at that time responsible for Iceland) was prepared to reach an agreement permitting British trawlers to use Icelandic waters provided their trawls were properly stowed. The Board of Trade were not satisfied with this proposal and advanced the most sweeping assertions concerning the rights of British trawlers in the matter of territorial waters. The Law Officers (Webster and Finlay) made short work of these exaggerated claims. They advised that, although there was a right of innocent passage for merchantmen through territorial waters for the purposes of navigation, this right was subject to 'any reasonable restrictions which the State may impose with the object of preventing the right of passage being abused for the commission of acts forbidden in its territorial waters'. The use of trawls being forbidden in Icelandic territorial waters, it was reasonable, in order to prevent the law being evaded, to require that trawlers passing through territorial waters should have their trawls properly stowed and not ready to be shot. They further advised that there was no obligation on the part of the Icelandic authorities to permit the presence of trawlers in territorial waters except for the purpose of innocent passsge. Finally, they repudiated any idea of an international 'duty' of commercial intercourse for which the Board of Trade had strenuously argued (but which in any case could scarcely have been involved as no direct commerce with the Icelandic people was presumably in issue). It is an Opinion which illustrates the wisdom of the convention or practice according to which any question of international law, wherever arising in the course of Government administration, is the concern of the Foreign Office.

The second volume of *International Law Opinions* is some thirty pages larger than the first, and contains material hardly any of which has appeared in print before, whether directly or indirectly. It consists of eight sections, the first two headed 'Individuals', with appropriate sub-headings, such as nationality, extradition, treatment of aliens, &c.; next, 'Jurisdiction', followed by 'State Responsibility', 'Denial of Justice', 'Insurrection, Rebellion and Civil War', 'Blockades by and against Insurgents', and 'Measures of force not amounting to War'. If anything, the material is richer and more profuse than that contained in the first volume, and it is a considerable test of the reviewers' powers of selectivity to decide which of the numerous items of interest to choose for comment.

The present reviewer may be forgiven perhaps for expressing a special interest in the topic of 'Nationality', the heading which opens the second volume. It is a matter for some regret that the Opinions collected under this heading were not made available in some form (not necessarily with comment) a great many years ago. This need not have been done in the form of a work generally accessible to the public, but might, for example, have taken the form of a digest similar to the handbook on 'Extradition' which for a long time now has been accessible to responsible students. This might well have avoided the somewhat scrappy treatment which the subject of British nationality received in pre-war textbooks on constitutional law. The fact is that unfortunately most of these Opinions have appeared too late, and, as Lord McNair says, 'many of the Reports in this Section possess only a historical interest'. Nevertheless, for the history of British nationality they retain a permanent value and even at this late hour are well worth publishing. Moreover, there are some Opinions which are still relevant to contemporary law and practice. We may note, for example, Dodson's Opinion of

31 December 1840 that British subjects are 'entitled to the protection of the Crown abroad as well as at home until *forfeited by their own misbehaviour*' (reviewer's italics). There are some early Opinions (1814, 1866) affirming the master-nationality rule. The Opinions concerning collective naturalization and loss of nationality are also of some interest, though the paucity of material concerning any *international* rule on these topics is disappointing.

Under the heading 'Corporations' which follows, there is an Opinion by Richard Webster and Edward Clarke of 16 March 1891 dealing with the application to British companies of Article IX of the Treaty of 1825 (between Great Britain and the Argentine Republic) stipulating for certain privileges in the matter of taxation in favour of British subjects. The Law Officers confined themselves to advising that they were 'not prepared to say that every company constituted under English law is a British subject in a sense which would entitle it to privileges of trade under the treaty'. The Opinion is very short and unsatisfactory and shows either that the Law Officers had not appreciated the point put to them, or (which is more likely) were not prepared to deal with it. This point, which is ably expounded in their instructions, is whether in truth a corporation could possess a nationality at all. It is probable that the view expressed by the present reviewer elsewhere is correct, namely, that the conception of the nationality of corporations belongs to this century, and that the nineteenth century held (as stated in the instructions) that a company 'cannot be said to have any true nationality' and that 'nationality is an attribute of physical persons and an artificial person although capable in contemplation of English law of possessing domicile, either British or other, can hardly be said to possess a national status'. In the First World War it was discovered that neither nationality nor domicil were sufficient tests of enemy character.

Under the rubric 'Extradition' probably the most interesting Opinion is that relating to the *Arton* case, with which international lawyers are already familiar, but which here figures in connexion with the purported renunciation by the prisoner of Article IV of the Anglo-French Extradition Treaty which provided that a person surrendered under the treaty should not be tried for any crime other than that for which he was extradited—the 'principle of identity'. The Opinion states it was not competent for the prisoner to waive the benefit of the Article since the obligations imposed by it were obligations between States and could not be waived by an individual. The Opinions on 'Exterritorial Asylum' and 'Slavery and the Slave Trade' which follow conclude Section I of this volume. The following Section contains Opinions on the *droit d'aubaine*, the exclusion and expulsion of aliens, and the liability of aliens to military and other services.

The meat of this volume would seem to be in the next three Sections respectively headed 'Jurisdiction', 'State Responsibility' and 'Denial of Justice', topics which perhaps figure most frequently in the day-to-day work of chancelleries, though probably more frequently during the period covered by these Opinions than in our time. Under the rubric 'Jurisdiction on Land Territory' are some Opinions arising out of the disturbed condition in Upper Canada in 1838 when armed raids by American citizens into Canada raised the question whether they could be charged with high treason against Her Majesty. The Canadian Attorney-General whose opinion was first sought appears to have been unfamiliar with the distinction between permanent and temporary allegiance, and he erroneously advised that the Americans participating in these raids and captured on Canadian territory could not, 'being aliens', be punished for treason. The correct view was stated in a joint Opinion of the Queen's Advocate (Dodson) and the two British Law Officers, Campbell and Rolfe. They expressed the decided opinion that aliens who forcibly invade British territory, in time of peace between

Great Britain and their own State, may lawfully be convicted of treason, because when they enter British territory they become subject to a local allegiance, the violation of which makes them liable to the penalties of treason (the passing of the Treachery Act, 1940, in the Second World War was necessitated by the fact that no such allegiance is due from *enemy* aliens). Such aliens *amis* cannot claim to be prisoners of war since the laws of war do not apply to the case, and, if not triable for treason cannot be tried at all (unless, of course, they have actually committed crimes of another character such as murder, burglary, &c.). The joint Opinion on this point is both learned and comprehensive. A number of Opinions deal with the question of criminal jurisdiction over foreigners abroad. The trend of these Opinions is to negative the existence of any jurisdiction over aliens other than that of a territorial character, and they do not provide any material to support the exercise of jurisdiction over other offences, with the possible exception of very strictly defined 'offences against the State' and there is no definite Opinion even to this effect. The Opinions on 'Jurisdiction in Territorial and National Waters' are not numerous but nearly all of them deal with some point of practical importance. The Opinion given in 1813 that the member of the crew of a foreign ship of war lying in British territory, though an alien, can be tried for murder committed on British territory is consistent with the decision of the Privy Council in *Chung-Chi-Cheung* v. *The King*[1] 126 years later. Murder committed on a foreign merchantman in a British port is triable here, but no opinion appears to have been given on the point raised in *R.* v. *Keyn.*[2] A British consul at a foreign port should neither approve nor try to prevent the action of the local authorities in arresting and removing insurgents from British merchant ships in the territorial waters of the country where the consul is stationed (Opinion of 1 July 1872 by Coleridge, Jessel and Parker Deane).

Section XIV ('State Responsibility') is introduced by some general comments by Lord McNair on the specific characteristics of State Responsibility and the peculiar problems associated therewith for which no parallels exist in municipal law. Most remarkable in this connexion are those Opinions of the early nineteenth century which illustrate the practice of taking domicil, not nationality, as the test of eligibility for British protection against a foreign government, and of declining to interfere on behalf of British subjects settled and domiciled in the territory of the foreign government against whom they invited the assistance of the British Government. This applied apparently not only to claims in the nature of breach of contract but to 'delicts' as well. The emphasis was on recourse to the remedies provided by local law, and a number of Opinions dealing with maltreatment of British subjects by police officers in foreign countries makes it clear that, before diplomatic intervention is sought, the injured party should first exhaust the remedies provided by local law. A long Opinion by Webster and Clarke of February 1892 suggested a qualification of this important principle. The Opinion arose out of the refusal of a Turkish harbour-master to allow the *Trojan*, a British ship, to touch at a Turkish port, and a consequential claim for compensation by the owners. A good deal is made in the instructions to the Law Officers of a distinction between Government agents acting 'for the direct benefit of the Government', and agents appointed by the Government in its capacity as *parens patriae*, who are not concerned with such direct benefit. According to the instructions, revenue officials fell into the first category, and judicial and administrative officials into the latter. As regards the acts of the former, it was said (quoting Mr. Caleb Cushing, U.S. Attorney-General, who propounded this doctrine) the maxim *respondeat superior* applied; but it did not apply to the latter, and, unless their acts were officially approved or specifically authorized, there was no remedy on the international level until recourse in the local courts directly against them had been taken and there was a denial of justice. This is an interesting doctrine, and, properly formulated or reformulated, there may be something in it (see *The Jessie*[1] in this century) but the Law Officers ignored it. They advised direct application to the Ottoman Government for compensation without requiring the complaints to exhaust local remedies. They based this advice on the ground that, although such a requirement was reasonable in the case of resident aliens, it could not be held to apply to British subjects prevented from visiting the country for the purposes of lawful trade by a private individual 'when holding public office and clothed with government authority'. There is much food here for reflection. The more important Opinions on the affair of the *Caroline* and *McLeod's* case are reproduced, although, as Lord McNair points out, most of the ground has been covered by Professor Jennings in his article published in the *American Journal of International Law* in 1938,[2] and since then further material has become available in Manning's *Diplomatic Correspondence*, &c. The Opinions on the Don Pacifico affair are reproduced; but it is to be feared, as Lord McNair indicates, that Dodson does not appear at his best on this occasion. Possibly he was inadequately instructed; at any rate this unsatisfactory episode is not much further illuminated by the advice he appears to have given. The Opinions on the responsibility of States for damage or injury to aliens arising out of insurrection, rebellion and civil war in their territory follow a consistent line, the main points of which are summarized by Lord McNair (vol. ii, p. 245). Two of these points may be mentioned here: (1) 'A State on whose territory an insurrection occurs is not responsible for loss or damage sustained by a foreigner unless it can be shown that the government of that State was negligent in the use of, or in the failure to use the forces at its disposal for the prevention or suppression of the insurrection'; (2) 'Such a State is not responsible for the damage resulting from military operations directed by its lawful government unless the damage was wanton or unnecessary, which appears to be substantially the same as the position of belligerent States in an international war.' The Opinions which follow occupy some thirty pages and provide concrete illustrations of these principles over a wide variety of situations. The material thus made available should prove of great value in filling in gaps on this subject in general textbooks on international law. It is interesting to observe in passing that in the Opinions arising out of the American Civil War (here and elsewhere in the collection) the Confederate authorities are referred to as a *de facto* Government or *de facto* States though publicly no more than recognition of belligerency was ever conceded by the British Government. The Section ends with two interesting Opinions, both signed by Christopher Robinson in 1817 and 1818, dealing with the question how insurers of property seized or damaged by a foreign government stand in relation to claims against that government. It is indeed remarkable, as the author observes, that so little material has emerged from the Law Officers' Opinions on this point, which is theoretically one of very considerable interest. It may be that the Foreign Office archives for the twentieth century will in due course yield some more positive material on the subject.

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[1] 1939[A.C.] 160.

[2] (1876) 2 Ex. Div. 63.

The Section which follows on 'Denial of Justice' begins with an Opinion by Sir Leoline Jenkins which is interesting both for its actual contents, and for the technical connotation which it attributes to the phrase 'denial of justice', which is thus seen to have a much longer history than most of us suspected. Later Opinions show an insistence upon exhausting *all* local remedies before the doctrine of denial of justice can be involved—to such a point, indeed, as may seem onerous at the present day. This insistence, however, was mainly due to the fact that, if denial of justice was found to exist, the only remedy (short of arbitration which was not then habitual) was by Letters of Marque and reprisal, a practice which Christopher Robinson in 1819 declared had fallen into disuse. As to what constitutes 'denial of justice', Lord McNair puts it as follows: 'What is abundantly clear is that mere error on the part of the court is not enough; there must be some element of bad faith, some glaring judicial incompetence, some manifest injustice, something shocking' (vol. ii, p. 305). May an insufficient time-limit for lodging a claim constitute a denial of justice? Dodson, in a case where the owner of a ship in a collision wished to institute proceedings in the Dutch courts, was not prepared to say that the time allowed for lodging a protest with those courts (twenty-four hours from the arrival in port of the complainant vessel) was a denial of justice (27 March 1835). The expressions 'corruption or flagrant partiality', 'repugnant to justice and reason', which recur in the Opinions, indicate the criteria applied to determine the existence of a denial of justice, and, in view of the preponderant influence of British and American practice in this field, they deserve the most careful study.

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[1] *American Journal of International Law* (1922), p. 114.

[2] Vol. 32, p. 82.

In Section XVI the author has collected Opinions (in so far as they have not already been published by Professor H. A. Smith and Sir Hersch Lauterpacht) on 'Insurrection, Rebellion and Civil War'. The Opinions deal almost exclusively with the status of belligerency and insurgency and not with the responsibility of the *de jure* government for the consequences of civil strife (which is dealt with under 'State Responsibility' noted above). They are of profound historical interest, but the concepts of belligerency and insurgency (together with that of neutrality which is inevitably associated with them) have been somewhat obscured in the application of modern international law. The Opinions arising out of the *Terceira* expedition and the affair of the *Shenandoah* are also of outstanding historical interest. Most of Section XVII ('Blockades by and against Insurgents: Double payment of Customs Duties') mainly concerns, perhaps, 'far-off battles long ago', but some of the points discussed (e.g. the distinction between closure of ports by the lawful government when they are in possession of insurgents and when the country is in a state of peace) may still have some relevance to the conditions of the modern world. The Opinions regarding the question whether customs duties paid to a *de facto* government, or an insurgent *de facto* power, can lawfully be demanded a second time by the *de jure* government on reasserting its authority are not entirely consistent, and the answer, according to the views expressed by the Law Officers, appears to depend on the circumstances.

This second volume comes to a close with Section XVIII ('Measures of force not amounting to War'). Here we have Opinions on pacific blockade, embargo and other forms of reprisal. The most interesting point which emerges is the reluctance of the Law Officers to admit that blockade could be justified except as an incident in regular belligerency. Doubts have always existed as to whether a 'pacific blockade' really was a blockade at all, and these Opinions, and the draft dispatch of 1893 by Lord Rosebery (but never sent) tend to confirm these doubts. Pacific blockade rested simply on the overwhelming force of the blockading Powers, and on the unwillingness or inability of the blockaded Power (always a small one) to treat the action as an act of war. But such measures now clearly belong to the past.

The trilogy ends with the volume dedicated to war and neutrality. This consists of twelve Sections dealing respectively with 'War in General', 'The Permitted Area of Maritime Warfare—Claims of Territory', 'Prize Courts', 'Privateers, The Declaration of Paris. Conversion of Merchant Ships into Ships of War', 'Miscellaneous', 'Some General Principles of the Law of Neutrality', 'Violations of Neutrality by permitting

Hostile Expeditions', 'The Use and Abuse of Neutral Ports and Waters by Belligerents', 'Contraband', 'Blockade', 'Unneutral Service', 'The Doctrine of Continuous Voyage. The Rule of the War of 1756. Convoy', and 'Miscellaneous'. This volume also contains two Appendixes, one a list of the Law Officers of the Crown since 1859, and the other a reprint of the paper read by Lord McNair to the Grotius Society on 'The Debt of International Law in Britain to the Civil Law and the Civilians'.

Lord McNair has anticipated the possibility that some may criticize his decision to include Reports on the subject of war and neutrality, on the ground, perhaps, that they wear nowadays an air of unreality. He answers this as follows: (1) To exclude this subject from his collection would be to neglect many Reports which, although their immediate cause may have been a question of war or neutrality, illuminate passages of the law of nations possessing a wider application; (2) In spite of the continual changes in weapons and modes of warfare, the legal principles remain fundamentally the same and have shown themselves to be capable of dealing with new situations by means of reasonable modifications. None of us can contemplate the possibility of a Third World War without feeling that it may well be the end of all law, whether international or otherwise, and, if we look at the question in that light, a collection of Opinions on the law of war and neutrality, as it existed in the nineteenth century, may seem somewhat academic. At the same time there may be (as there have been since the end of the Second World War) wars on a smaller scale in respect of which the passages expounded in this third volume may be relevant. And, quite apart from all that practical aspect of the matter, in the interests of scholarship and historical accuracy, a collection which, dealing as it does mainly with the nineteenth century, could scarcely be faithful to the truth if it omitted these Opinions. It is not likely, therefore, that many of us will doubt that the author has taken a decision which was as prudent as it was inevitable.

The first two Sections of this volume contain some interesting Opinions on trading with the enemy (though this subject was dealt with by legislation in the two world wars), the position of enemy subjects of one belligerent in the territory of another, and upon military occupation. The Opinions on 'claim of territory' reveal the interesting fact that whereas, under English prize law, such a claim can only be made by the neutral whose territory is violated, under French prize law, as it was in the nineteenth century, the owner of the ship seized in neutral waters could make a claim for damages. In the section on Prize Courts we read of the attempts made to press the British Government to demand the release of the *Springbok* through diplomatic channels instead of waiting for the judgment of the Prize Courts, and of the advice of the Law Officers that it should refuse to interfere 'upon *ex parte* statements of injury which subsequent investigation in the Prize Court has proved to be wholly without foundation'. If there was delay in the Prize Court that was another matter of which Her Majesty's Government might in due course complain.

So far as the present reviewer is aware, the Opinion signed by Atherton, Roundell Palmer, Robert Phillimore and Travers Twiss (impressive signatures) and dated 27 March 1863 has never previously been published. This Opinion (vol. iii, p. 83) arose out of a Bill before the United States Congress for authorizing the United States Government to issue Letters of Marque. The Law Officers were asked to advise as to the course to be followed by British naval officers in the event of privateers interfering with neutral commerce. It appeared that the object of the United States Government in commissioning privateers was not to interfere with neutral commerce generally but to enable such vessels to capture particular ships such as the *Alabama* which were harassing American ships as well as neutrals. The Law Officers advised that any ship belonging to the Royal Navy was entitled, if it saw a British merchant ship captured by, or in tow of, a ship wearing a Privateer Jack of the United States, to send an officer aboard to verify the Letters of Marque or Commission of War 'for a private ship is not exempt from the obligation of submitting to have its Letters of Marque or Commission of War verified'. If the captor was found not to possess such Letters of Marque it was the duty of Her Majesty's ships to use such force or measures as were necessary to secure the release of the British merchantman. If the Letters of Marque were confined to authorizing the capture of particular ships (such as the *Alabama*) or a class of ships, then the seizure by a privateer so authorized of a British merchant vessel was altogether unlawful, and it would be the duty of Her Majesty's ships to cause her to be set free. In another Opinion the claim of the Spanish Government (Spain being at war with Chile) to treat as pirates privateers commissioned by Chile, together with the foreign members of their crews, unless the captain and majority of the crew were Chilean citizens, was rejected (21 March 1866). Any members of the crew who were captured were entitled to be treated as prisoners of war. This is an important and lengthy Opinion. (Incidentally Ortolan is referred to therein as 'a respectable modern writer, but not of the first class'.) 'The law of Spain', it says, 'is municipal and applicable to her own subjects only: but the crime of piracy on the high seas is a matter of international law, the character of which it is not competent to any State to vary.' A number of Opinions about the Declaration of Paris which follow, and are most interesting, make it clear that States who were not parties to that Declaration were fully entitled to commission privateers.

The most important Opinions about the *Alabama* are reproduced in this volume. It is hardly necessary to point out the significance of this affair in the history of international law and arbitration. The facts are well known. In June 1862 the *Alabama* was being built at Birkenhead and was nearly completed. It was obviously intended for a man-of-war. On 23 June particulars were forwarded to Earl Russell of her character, and in an Opinion of 30 June, which is reproduced by Lord McNair, the Law Officers advised that the construction of the vessel was a 'manifest violation of the Foreign Enlistment Act' and that she should be prevented from putting to sea. The facts were laid before the commissioners of customs (whose duty it was to enforce the Act) but, for some reason which is still not clear, they declined to move. On 23 July further evidence was submitted to the Law Officers who again endorsed detention of the vessel. By some accident, never satisfactorily explained, but probably connected with the severe illness of Sir John Harding, Queen's Advocate at the time, the papers were not returned until 29 July. Instructions were issued to seize the vessel, but she had already sailed on the evening of the 28th. Although she remained for two days off the coast of Anglesey there was no serious attempt at pursuit, and she afterwards made her way to the Azores, where she received her armament, which was brought from Liverpool in two British ships. She was later commissioned by the Confederate Government, and, after a most destructive career, was finally sunk off Cherbourg on 19 June 1864. There can be no doubt that the whole affair on the British side was badly bungled. The advice of the Law Officers was sound, and the *bona fides* of the British Government at the summit was unquestionable. But somewhere on a lower level (the facts, one supposes, will never really be known in full) there was the most appalling incompetence which cost the nation, in addition to grave damage to our prestige, a sum of fifteen million dollars. The only good thing that came out of it was the permanent willingness of the United States and Great Britain to submit their differences to pacific settlement.

Section XXIX, following the Sections XXVI ('Use and Abuse of Neutral Ports and Waters by Belligerents'), Section XXVII ('Contraband') and Section XXVIII ('Blockade'), covers a sphere of the law of neutrality which, as Lord McNair describes it, 'is a comparatively modern term', namely, 'Unneutral Service'. This section comprises Opinions of great learning and interest. In particular the affair of the *Trent* is here treated in great detail and with very close reasoning. The whole of this section is an interesting study of the use made of textbook writers from Bynkershoek to Hautefeuille.

Section XXX, covering the 'Doctrine of Continuous Voyage and the Rule of the War of 1756', is *par excellence* a branch of international law which is 'international lawyer's law'; a little esoteric in fact, but fascinating. The same may surely be said of the right of angary, with which Lord McNair lays down his pen.

J. Mervyn Jones

Académie de Droit International de la Haye: Recueil des Cours, 1955. Volume 87. The Hague, 1956. 551 pp. (plus 22 pp. Index).

This volume opens with a course of lectures by Dr. Wilfred Jenks entitled 'The International Protection of Freedom of Association for Trade Union Purposes'. Inevitably the lectures develop into an exposition of International Labour Organization methods of procedures, a theme which nobody is better qualified to write about than Dr. Jenks. Some readers may feel that the title goes a little beyond the subject-matter of the lectures and that Dr. Jenks perhaps makes rather large claims for the achievements of the I.L.O. in establishing the Committee on Freedom of Association. For he says of this Committee (p. 9): 'It represents a significant contribution to the development of international fact-finding and conciliation procedures for the examination of petitions and complaints made by private persons or bodies to international organs.' He then goes on to say: 'It may prove to be of pioneer importance as an experiment in the development by semi-judicial processes of a growing body of accepted doctrine on crucial social and industrial issues which will profoundly influence legal development in many countries.'... To anyone outside the Organization this kind of statement requires further explanation and support. What is the 'growing body of accepted doctrine', and what is the 'doctrine' about, and by whom is it 'accepted'? What are the 'crucial social and industrial issues'? Unless questions such as these are further explained, there is a risk that the reader may get the impression that there is in the lectures a tendency to exaggerate somewhat the performance of the I.L.O. and to draw from it conclusions broader and more general than the facts really warrant. Many of Dr. Jenks's remarks, on the other hand, are penetrating; for example: 'Historically the claim to freedom of association derives from the principle of religious freedom.' Doubtless he has in mind the Tolpuddle Martyrs. It seems necessary, however, to recall at the same time that freedom of association also owes something to non-religious origin. The chapters on the case-law of the Committee are most interesting. The importation into its thinking and procedure of the ideas of international due process, exhaustion of local remedies, and of the principles of international law concerning the expulsion of aliens, indicate a respect for the fundamental rules of international law. Indeed it seems (p. 761) that a breach of international law as such is not within the competence of the Committee, except in so far as it may involve the exercise of trade union rights, and the Committee will not consider allegations of breaches of human rights which do not involve the principle of freedom of association.

Next in this volume is a course of lectures by Norman Bentwich on 'Recent Developments of the Principle of Domicile in English Law'. Mr. Bentwich has always taken a special interest in private international law, and these lectures exhibit deep reflection on the problems connected with domicil. The principal issue in recent years has been a dissatisfaction with the English cases which, when one domicil of choice is abandoned for another, allow of a revival of the domicil of origin—a decision which in many cases has no relation to reality. Mr. Bentwich concludes, after a survey of the last twenty years, that the courts have tended to make exceptions to the exclusive rule of domicil as the basis of personal status, and to interpret the concept of domicil in such a way as to bring it into more accord with the common man's conception of home. Perhaps the statutory modifications of 1944 and 1950 enabling a wife, in certain circumstances, to sue for divorce in the English courts, even though her husband is not domiciled in England, might also have been discussed in this connexion. The last chapter of the lectures, which deals with the application of the law of domicil in Palestine under the British mandate and in Israel, is well worth study.

The general course on 'The Fundamental Principles of International Law', which is given every year at the Academy by international lawyers of standing, was delivered in 1955 by Dr. Schwarzenberger. It is a little unfortunate that he has found it necessary in these lectures to expatiate once more upon what he has chosen to describe as the 'inductive' method, but he does not linger very long on this theme, and the lectures, taken as a whole, should prove stimulating to the thoughtful student to whom they are directed. Perhaps it may be felt that Dr. Schwarzenberger is a little too disposed not to take international law as he finds it, which is, after all, what any professional international lawyer must ultimately in large measure do.

A French jurist, Dr. Pinto, contributes a course of lectures on 'La prescription en droit international'. The question of acquiescence, or recognition, as an acknowledgement of legality, has a special importance in international law owing to the absence of any universal compulsory prediction of any universal legislature. Dr. Pinto deals very lucidly with this question, and, although the lectures occupy only some fifty pages, they contribute a useful and fresh treatment of the subject.

The volume concludes with a course of lectures by Professor François on the Permanent Court of Arbitration, including its origin, its jurisprudence, and its future. Professor François has been Secretary-General of the Court since 1954, and that fact alone, quite apart from his standing as an international jurist, makes the lectures definitive. Although the function of the Court in ordinary legal disputes between States has now been virtually superseded by the International Court of Justice, Professor François shows that, in the field of conciliation, and in the field of disputes between individuals and governments, it may still fulfil a useful role.

J. Mervyn Jones

Académie de Droit International de la Haye: Recueil des Cours, 1955. Volume 88. Leyden: A. W. Sijthoff. 1956. 523 pp.

The second volume of the *Recueil des Cours* for 1955 includes five lectures. If judged from the point of view of their contribution to the development of international law, they are of varying interest.

When a learned author writes about 'La Crise et les Transformations du droit des gens', one expects a display of 'realism' involving an attack upon the foundations and purposes of international law. Professor Josef L. Kunz, however, is far removed from that school of thought. He not only submits that:

> 'le néo-réalism donnant une critique purement négative aboutit pratiquement à la négation du droit des gens. En faisant cela, le soi-disant néo-réalism est absolument irréaliste et doit être combattu avec énergie. La co-existence des hommes, sur le plan international ou national, présuppose nécessairement le droit' (p. 38),

he also proclaims his own conviction (p. 100):

> 'Mais je reste optimiste, en ce qui concerne la domination de la crise et le développement d'un droit des gens plus vigoureux et effectif.'

Professor Georges Berlia analyses the practice of international tribunals in regard to their own competence (jurisdiction)—a somewhat narrow topic which could perhaps have been put on a broader basis by a close investigation of the question whether, particularly in connexion with arbitration proceedings, municipal law has established any uniform practice which may be said to constitute a general principle of law.

Professor Boissier's study of 'L'Union interparlementaire et sa contribution au développement du droit international et à l'établissement de la paix' does not eliminate the doubt whether it is really possible to speak of any contribution to international *law* made by the Union. A lecturer who for over thirty years has faithfully served the Union is perhaps not unnaturally exposed to the risk of over-estimating its significance to lawyers.

Mr. Alwyn V. Freeman's lecture on the 'Responsibility of States for unlawful Acts of their Armed Forces' is by far the most substantial paper in the present volume. The subject is of great practical importance. It discloses, as Mr. Freeman puts it (p. 404), 'a rather striking progression in the concept of liability for wrongful acts of a State's armed forces' and thus throws much light on the true state of modern international law. The author has collected a large amount of material, some of which has not previously been published (see, in particular, pp. 359, 360 relating to paternity cases). He provides an excellent survey of the prevailing legal situation. His work is likely to afford real assistance to practitioners in many countries.

The final lecture in the present volume is one by Professor Oliver of the University of California on 'Contemporary Problems of Treaty Law.' It touches upon many points in developing a 'thesis' (p. 423):

> 'The real international law of the present, and possibly of the very considerable future, may, like the first small mammals among the silurian reptiles, be found relatively unnoticed in the underbrush of international agreements, of foreign office practice, of national judicial and administrative actions, and of the ways of life of international organizations.'

It is perhaps open to doubt whether in essence this thesis is altogether new. There may even be readers to whom its elaboration will appear just enough to whet their appetite.

F. A. MANN

The Law of Land Warfare. United States Army Field Manual, No. 27–10. Washington. 1956.

As the British and United States commentaries on this important subject were last published in 1936 and 1940 respectively, it is obvious that the momentous events of the intervening years have made a careful revision of the texts already overdue. The British version, which is unlikely to be at variance with its American counterpart, presumably still awaits the belated ratification by this country of the 1949 Geneva Conventions.

Let it be said straight away that any hope of a radical change of outlook, at any rate on the part of our usually more enterprising American brethren, will be disappointed. By clinging like some Royal Academicians to outmoded tenets of orthodoxy, the authors have failed to reflect in this handbook the changing countenance of modern warfare. Thus one is informed, in all seriousness, that while it is unlawful to use lances with barbed heads and projectiles filled with glass, 'explosive "atomic weapons", whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment' (para. 35). So far has political expediency triumphed over the general sentiment of humanity that even the Devil can now cite 'positivism' for his purpose. Well might Spaight say: 'The historians of the future will be puzzled by the conclusion of new Geneva Conventions in 1949, and the failure of the Powers who agreed to them to do anything to regulate those methods of war which, if continued, will make the humanitarian provisions of those Conventions read like hypocritical nonsense.'[1]

Totalitarian régimes and democracies alike are in danger of succumbing to the temptation to wage war by the unlimited use of exceedingly destructive weapons. Moreover, signs are not wanting that belligerents no longer understand by the term 'military necessity' only those exceptional circumstances of practical necessity contemplated by express reservations in several articles of the Hague Regulations and other conventions, but extend its meaning to embrace violations of established rules of warfare prompted by mere military expediency or advantage. Such a practice will result in the elevation to an absolute supremacy of strategical or military considerations wholly incompatible with the observation of international law. The truth is that at the present time it would be wellnigh impossible to formulate a set of humanitarian principles likely to meet with world-wide approval. On the other hand, it is merely putting the cart before the horse to attempt the legal regulation of warfare without recourse to some generally accepted criterion or standard of conduct which such regulations are designed to secure. It is essential not only to fix the limits at which the necessities of war ought to yield to the requirements of humanity but first of all to establish what are in fact those principles of humanity.

While most treatises on international law still speak of a body of unwritten or customary rules of warfare firmly established by the practice of States, its existence is on the whole illusory. Indeed, he would be a bold writer who ventured to lay down any universally recognized principle of conduct not already within the ambit of conventions and treaties. It is certainly misleading to suggest that 'the customary law of war may be compared with the unwritten Anglo-American common law' (para. 4). Furthermore, the relationship between this so-called unwritten or customary law, treaties and United States municipal law is not clearly defined.

Imagination cannot resist the intriguing vision of John Austin confronted with the following passages. Under the Constitution, treaties form part of the 'supreme law of the land', and consequently have a force equal to that of laws enacted by the Congress. 'Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof' (para. 7 (*c*)). 'Technically, each of the lawmaking treaties is . . . binding only between the States that have ratified or acceded to, and have not thereafter denounced the treaty or convention, and is binding only to the extent permitted by the reservations, if any, that have accompanied such ratification or accession on either side' (para. 7 (*a*)). Nevertheless, 'the treaty provisions quoted herein will be strictly observed and enforced by United States forces without regard to whether they are legally binding upon this country', . . . (but) . . . 'military commanders will be instructed which, if any, of the written rules herein quoted are not legally binding as between the United States and each of the States immediately concerned, and which, if any, for that reason are not for the time being to be observed or enforced' (ibid.). Again, while the customary law of war 'is binding upon all nations', the treaty provisions 'may be said to represent *modern international public opinion* as to how belligerents and neutrals should conduct themselves in the particulars indicated'. Finally, 'the customary law of war is part of the law of the United States and, in so far as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country' (para. 7(*a*)).

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[1] *Journal of the Royal United Service Institution*, February 1954, p. 60.

The growth of this manual to twice its former size is mainly attributable to the 1949 Geneva Conventions (in particular, those relating to prisoners of war and to the protection of civilian persons) the most important provisions of which are conveniently quoted verbatim in bold type throughout the text. It will be recollected that those Conventions have been ratified by the United States and came into force for that country on 2 February 1956.

Attention may be directed to the following paragraphs of the manual, concerning aspects of land warfare not specifically dealt with in the Conventions, which provoke a number of controversial questions: Atomic weapons, napalm and flame throwers (paras. 35 and 36); commandos and airborne troops (para. 63); killing of prisoners (para. 85); asylum to prisoners of war (para. 199); occupation costs (para. 364); local governments under duress and puppet governments (para. 366); determination whether property is public or private (para. 394); crimes under international law (para. 498); responsibility of military commanders for acts of subordinates (para. 501); suppression of war crimes, and universality of jurisdiction of United States military tribunals (paras. 506 and 507). It should be pointed out that 'those provisions of the manual which are neither statutes nor the text of treaties to which the United States is a party are not to be considered binding upon courts and tribunals applying the law of war' (para. 1).

Paragraph 509, relating to the defence of superior orders, now closely resembles the 1944 amendment to paragraph 443 of chapter 14 of the *British Manual of Military Law*—itself based on the statement which appears in Oppenheim's *International Law*, vol. ii (6th ed., 1940, by Lauterpacht).

In conclusion, it is interesting to note that 'if a State is called upon, under Articles 42 and 43 of the Charter, to take military action against an aggressor, that State loses its *right* to remain neutral but actually loses its neutrality only to the extent that it complies with the direction of the Security Council. A military commander in the field is obliged to respect the neutrality of third States which are not allied with the United States in the conduct of hostilities and are not violating their duty of neutrality toward this country, except to the extent that the State concerned has expressly qualified its neutrality' (Neutrality under the Charter of the United Nations, para. 513).

N. C. H. Dunbar

World Polity. A Yearbook of Studies in International Law and Organization. Volume I. Spectrum Publishers, Utrecht/Antwerp: 1957. 247 pp. No price stated.

The Institute of World Polity, as one learns from the first *Yearbook* issued by it, was established in April 1945 and is, apparently, connected with Georgetown University, Washington, D.C. It is an 'organization for systematic research and discussion of questions affecting international relations and the foreign policy of the United States'. Although the study of international law is not specifically mentioned as one of its purposes, the name of Ernest H. Feilchenfeld, who until his death in March 1956 was the Institute's chairman, is sufficient guarantee of legal scholarship. The present volume, edited by Dr. William V. O'Brien as acting chairman, certainly includes much that is of interest to international lawyers, though the introductory article on the history and functions of the Institute does not perhaps succeed in giving a clear and convincing picture of the task which the Institute actually discharges.

An article by Dr. Feilchenfeld and Dr. Ulrich Kersten on 'Reparations from Carthage to Versailles' collects a great quantity of useful factual material. The authors are not concerned with legal analysis. This probably explains the bald and surprising statement on the question whether in the event of default of payment there accrues a liability to pay interest (p. 60):

> 'Since, according to our view, private law analogies do not apply to treaty debts subject to International Law, we would not regard such accrual of interest as a matter of course in the absence of express stipulation.'

In the following article Dr. O'Brien discusses the question whether the Constitution of the United States has any application in the American Zone of Occupied Germany, or, indeed, in any country occupied by the armed forces of the United States of America. The numerous American cases on the subject have conveniently been collected by the learned author and their discussion is of substantial value, particularly to the non-American reader. In the fundamental decision of the post-war period, *Re Yamashita* (1945) 327 U.S. 1, a majority of the Supreme Court held that it could not review the decisions of American military tribunals set up in occupied territory. Dr. O'Brien prefers the views of the minority and hopes 'that it will come to be generally accepted' (p. 90). He advocates the development of an 'American *jus gentium*' and the creation of 'a Constitution for Foreign Areas' (p. 106), without, however, considering the practical effects of his suggestion upon the work of military tribunals.

A further article by Dr. O'Brien on the 'Meaning of Military Necessity in International Law' is a shortened and revised version of the author's thesis submitted to Georgetown University in 1953. It does not take into account the whole of the material which has appeared since then (such as Oppenheim's 8th edition or Stone's recent work), but it is a serious attempt to penetrate to the bottom of a very difficult problem. The author suggests the following definition of military necessity 'for Americans' (p. 174): 'All measures immediately indispensable and proportionate to a legitimate military end, not prohibited by the laws of war or by the natural law, taken on the decision of a responsible commander subject to judicial review.' The author does not explain how this formula would work, for instance, in the case of the atom bomb.

Finally there are two articles on the 'Legal Status of Germany'. The first contains a memorandum presented by two American officers to the Judge Advocate-General and a number of short statements by various persons connected with the Institute. The second is by an anonymous German writer. It is open to doubt whether these contributions throw much new light on the subject. A remarkable statement occurs at p. 177:

> 'By 1948 the seemingly academic problem of the legal status of Germany had become highly controversial, highly political and full of grave and dangerous implications. An answer one way or the other at that time might have produced an international war, stratified boundary situations prematurely, or produced a war inside Germany.'

It is not difficult to remember many discussions of the problem from the early part of 1947 onwards which, fortunately and perhaps in no way surprisingly, failed to produce such dire consequences.

F. A. MANN

Communicazioni e Studi, Volume VII. Edited by R. Ago, M. Guiliano and P. Ziccardi. Milan: Giuffrè. 1955. 796 pp. Lire 4,500.

This *Year Book* has established itself as an authoritative guide to current Italian thought in matters of public and private international law. Occasionally a contribution from abroad is included, and the papers offered by Italian writers have sometimes been published before in *Studi* which are not easily accessible to foreign readers. The present volume follows worthily upon its successor, but the emphasis is on public rather than on private international law.

Professor Guggenheim, in an ambitiously conceived and well-documented article, attempts to link the Roman approach to international relations and the tripartite division of Roman law with the medieval view of law at the time when independent units emerged in the Holy Roman Empire in the twelfth and thirteenth centuries. In so doing he rightly draws attention to a period in the history of international law which deserves a closer study. Professor Ago himself analyses the various views which underlie the concept of positive law which has over the centuries misled students of international law to identify it with law enacted by the State rather than with established custom and examines the difficulties which have confronted even the advocates of the latter approach, when dealing with basic norms. He overcomes these difficulties by using his own distinction between formal rules and rules of spontaneous creation, first developed in his *Scienza Giuridica e Diritto Internazionale* reviewed in this *Year Book*, 27 (1950), pp. 484–6. Professor Cansacchi gives an authoritative account of the legal status of the Holy See between 1870 and 1929 as it emerges from the history and wording of the Lateran Treaties of 1929. Professor Capotorti, in a strictly factual study, discusses the competence of the various organs of Unions to enter into agreements with States and with other Unions. His broad approach leads him to consider not only those provisions of the constituent charters which envisage unilateral or bilateral declarations, but also inherent powers to act expressed, for instance, in Articles 10 and 42 of the Charter of the United Nations, and the competence to enter into transactions governed by domestic law and to make technical agreements. Professor Duranti, continuing his research into the doctrine of the continental shelf developed in his book on *La piataforma litorale nel diritto internazionale* (1955), gives a thorough survey of the relevant international practice and doctrine and examines critically the recent Bill laid before the Italian Parliament. Dr. Migliazza devotes his attention to the problems raised in the request of the Executive Council of U.N.E.S.C.O. for an advisory opinion as to the binding effect of judgments of the International Court of Justice given in accordance with Article 12 of the statute of the administrative tribunal of the I.L.O. He examines the function of administrative courts within the framework of the United Nations Organization and discusses whether different effects must be attributed to judgments and advisory opinions given by the International Court of Justice acting under Article 12. In his view the Court acts as an organ of the United Nations and the I.L.O. has, for this purpose, become part of the latter organization. The final conclusion that any advisory opinion given in the circumstances invalidates the decisions of the administrative tribunals which form the object of the request for the advisory opinion and binds the party which has asked for it, is reached by a process of reasoning which is interesting, but not easy to follow. Dr. Parini contributes an informative account of the present state of the international conventions on industrial property, especially regarding patents, as they affect Italy. Professor Ziccardi, who studies the object of characterization and the function of connecting factors and of operative facts, is a writer whose thought is difficult to follow, but whose arguments deserve considerable attention. After rejecting the tenets of the local law theory, he advances the proposition that the object of characterization is the individual question of foreign law. This proposition offers many interesting perspectives, especially since it eliminates secondary characterization, but it is submitted that it does not provide a fully adequate explanation of the vexed problem of characterization itself. As the present reviewer hopes to show elsewhere, the process of characterization includes two phases. The individual claim may be expressed in terms of foreign law or of the *lex fori*. The operative facts of the rules of private international law of the *forum* are formulated either in terms of the *lex fori* or in terms peculiar to the private international law of the *forum*. In applying its own rules of private international law to the claim presented in terms of some system of domestic law, each must be interpreted in terms of the other. Professor Ziccardi is, however, correct in drawing attention to the pivotal importance of the claim itself as the key to the problem of characterization.

More than one-third of the volume is devoted to what have now become annual surveys of the Italian literature on private international law (Professor Bentivoglio) and public international law (Professor Malintoppi) and of the practice of the courts in these fields (Drs. Zannini and Fabozzi respectively). Dr. Migliazza reviews the practice of the International Court of Justice during 1955. A valuable series of book reviews concludes the volume.

K. LIPSTEIN

Germany and the North Atlantic Community. A Legal Survey. By M. E. BATHURST and J. L. SIMPSON. London: Stevens & Sons Limited. 1956. xi+217 pp. 35*s.*

One of the authors of this small but important book is described as Legal Adviser to H.M. Embassy, Bonn, formerly Legal Adviser to the United Kingdom High Commissioner for Germany, and the other as formerly of the Control Office for Germany and Austria. It may be taken, therefore, that they write as experts in their subject, which is the developing position of Germany in her relations with other States between the autumn of 1944 and the Conference of Foreign Ministers at Geneva in November 1955. The events of these eleven years are dealt with only so far as they are material to the legal issues raised during that time, and within that limitation the authors have produced a concise, lucid and fully documented account of all the principal legal measures to which the Government of the United Kingdom (or their representative in Germany—successively the Military Governor, the High Commissioner and the Ambassador) were party.

The book begins with the initial occupation of German territory on 18 September 1944, and with an outline of the early enactments of the Military Government. This legislation is presented against the background, on the one hand, of the declared war aims of the United Nations, and, on the other hand, of the Nazi legal system—courts and laws—which it replaced. The legality of the occupation laws is tested by reference to the Hague Regulations (in particular Article 43), and the difficulties in justifying them on legal grounds are indicated.

The second part of the book consists of an examination of the Declaration Regarding the Defeat of Germany, of 5 June 1945—the unconditional surrender—following and superseding the two acts of military surrender signed at Rheims on 7 May and Berlin on 8 May 1945. The text of the Declaration and the contents of other consequential documents, such as the Protocol of the Proceedings of the Berlin Conference of July–August 1945, are given as the starting-points for the establishment of the Control

Council for Germany. The authors then devote a valuable section to a review of the legal controversies which resulted. On the controversy concerning Germany's status in international law, the arguments for the view that the German State was extinguished, the argument that Germany was subjugated, the argument that Germany lacked a government and had therefore ceased to exist as a State, are all analysed, and at the end of it all 'the classification of Germany as a State, though an abnormal one, is to be preferred'. Next are examined the status of the Military Governors, the termination of the state of war after the unconditional surrender of Germany, and the inapplicability of the Hague Regulations in the circumstances of the post-surrender period when the Four Powers 'ceased to be military occupants bound by the Hague Regulations' —a conclusion which has not been accepted by, at least, the Supreme Court of the United States. Of particular interest for international lawyers is the description of the development of the practice followed in and after 1945 in the conduct of Germany's foreign relations. At first, it would appear, the Governments of the Occupying Powers entered into international agreements either in respect of Germany or in respect of their several zones; they represented their zones in international organizations. In 1948 the Military Governors of the British, French and American zones signed a treaty, the Convention for European Economic Co-operation, to which two of the Occupying Powers were parties, and this arrangement became typical. The authors cite a number of instances of this kind as evidence that the international personality of Germany ceased to be—if it ever was—'suspended', and to refute the theory that the international relations of the Occupying Powers were, by some form of 'intervention', extended to cover Germany.

The third part of the book deals with the period of the Allied High Commission, 1949–55. The organization and powers of the High Commission are fully described, together with the Occupation Statute and the Agreement as to Tripartite Control. The Charter of the Allied High Commission formed, as it were, a bridge between the exercise of powers by the Occupation Authorities and their exercise by the German Federal Government. The latter began to take its part in international affairs almost as soon as it was established and 'its authority in this field was to increase steadily'. In October 1949 the German Federal Government assumed responsibility for representing the Federal Republic in the Organization for European Economic Co-operation. In December 1949 the various conventions for the protection of industrial property, and in 1950 those for the protection of works of literature and art, were declared to be again applicable in the territory of the Federal Republic. In 1951 the Allied High Commission issued a Directive concerning treaties concluded by the former German Reich, which laid down a procedure for giving effect to such treaties as between the Federal Republic of Germany and the other Parties thereto. All this was part of a process whereby the Western Powers, pending the establishment of the new régime, increased the powers of the German Federal Government and diminished their own authority.

In Part IV of the book the Basic Law of 1949 is examined, special attention being paid to the treaty-making power and the right of the Federation to transfer sovereign powers to international institutions, and to the Conventions signed at Bonn in 1952, which provided for the termination of the Occupation on 5 May 1955 (subject, nevertheless, to the reservation of certain rights to the Western Powers for an indefinite time thereafter), rights relating to Berlin, the stationing and security of foreign forces in the Federal Republic, and the settlement—necessarily provisional—of 'matters arising out of the War and the Occupation'.

An assessment of the status in international law of the Federal Republic of Germany is especially valuable, having regard to the present division of the 'all-German State' and the claim sometimes made by the Federal Government 'to speak and to act for the German nation as a whole'. Finally, under the heading 'Reunification or Division?', the authors discuss the relations between the Soviet Union and West and East Germany; they compare the legal position of the German Democratic Republic with that of the Federal Republic; and they conclude by summarizing the respective attitudes of the Three Powers and Russia to the 'two Germanys'.

The book is fully documented and contains a 'Table of Treaties and Other International Acts', a feature which one would like to become more usual. There is a good index, and altogether it is a book whose usefulness is out of all proportion to its size.

A. B. Lyons

I Diritti et gli Obblighi degli Stati, Volume I. By Mario Giuliano. Padua: Cedam, 1956. xxxi+509 pp. Lire 5,200.

The present volume forms the first part of Professor Giuliano's contribution to the comprehensive *Trattato di Diritto Internazionale* edited by Balladore Pallieri, Morelli and Quadri. Within the framework of the problem of the rights and duties of States it deals with the exercise of State activity in space and thus includes a discussion of State territory, the high seas, territorial waters, and airspace. The book is conceived as part of a detailed handbook on public and private international law and treats the subject on broad lines. Its particular feature, unusual in Italian treatises, is the reliance on State practice, treaties, judicial decisions, arbitral awards and the work of the International Law Commission. Theoretical considerations are mainly restricted to questions where a divergence of opinion in practice imposes the need to offer a constructive solution. Nevertheless, the author has included a discussion of general principles, in particular of the nature of sovereignty, which takes up about one-sixth of the volume. He refuses to follow a recent trend in Italian writings which distinguishes between external sovereignty and dominium over the territory itself and adopts, whenever possible, a pragmatical approach.

Starting from the distinction between original and subsequently acquired territory and concentrating on the latter, the author questions the time-honoured categories of acquisition of title. He examines in detail the subjective element which must accompany any acquisition of territory and notes that the further requirement of effectiveness is present, not only in acquisition by conquest or following the extinction of a State, but also in the case of prescription, of cession and of adjudication. On the other hand, he denies the need for an express renunciation which he regards, however, as normally, although not necessarily, inherent in the requirement of effectiveness. Non-recognition of territorial changes by third parties is, in the view of the author, both disappointing and dangerous in its effects, but he inclines to mitigate these effects by relying on the unqualified principle that in the face of consolidation, continuance of non-recognition must itself constitute an illegal act. As regards the relation between recognition or failure to recognize and the application of foreign law, the somewhat enumerative treatment, would have benefited from a consideration of the discussion in *Transactions of the Grotius Society*, 35 (1950), pp. 157–88. The section on the extension of sovereignty to *terrae nullius* strikes a nice balance between the historical, theoretical and practical aspects of the problem. In accordance with his general thesis that effectiveness and intention are the corner-stones of sovereignty in international law, the author rejects any attempts to formulate specific grounds whereby sovereignty is lost. At the same time he rejects the need for an *animus derelinquendi* as an abstract requirement, although in certain circumstances such an intention would appear to be relevant. The ensuing two chapters on territorial frontiers and limits and the high seas constitute the core of the volume. It is unnecessary to enumerate here the many problems which are raised in this connexion since the subject-matter is well known. It must suffice to state that the author has marshalled his facts and materials most adroitly (at p. 392, note 3, one misses a reference to *Chung Chi Cheung* v. *The King*, [1939] A.C. 160; *Annual Digest, 1938–1940*, Case No. 87), especially the many treaties in this field, and has given special prominence to recent attempts at codification. The remaining chapter is concerned with the space above and below the sea, polar regions and a number of related topics.

In presenting a handbook on a particular, albeit wide, aspect of international law, it is necessary to keep a judicious balance between theory and practice, between factual exposition and critical selection, between the needs of the student and of the practitioner. Professor Giuliano has written such a book, which is particularly noteworthy for the fact that it indicates a new and fruitful direction in the trend of Italian studies in international law.

K. Lipstein

An Introduction to International Law. By Wesley L. Gould. New York: Harper & Brothers. 1957. xv+679+100. $7.50.

This book is intended as a textbook for undergraduates taking courses in either law or political science. In scope it covers the entire range of the traditional law of peace, together with three concluding chapters on 'Force and International Retribution', 'War, Aggression and Neutrality', and 'Hostilities and War Crimes'. The main omission, a deliberate one, is of any general account of international organizations; these are dealt with only incidentally, as, for example, in connexion with pacific settlement of disputes, privileges and immunities, and with international transportation and communication. In addition to the material commonly found in a student's books, this textbook, no doubt to accommodate the political scientist, contains a certain amount of jurisprudence. There is an initial chapter on 'The Nature of Law', and a discussion of the general problem of legal personality precedes the discussion of international legal personality in chapter 6. There is also a good deal of sociology, history and current international politics, so that in parts the book takes on the appearance of a textbook on 'International Relations'. This, without doubt, will have its appeal to many students who dislike learning the structure of legal rules in a vacuum. Dr. Gould also has a happy knack of tersely illustrating his points by reference to past or present diplomatic incidents.

The student's task is, however, a formidable one. Lest the title 'Introduction' misleads, it is well to point out that there are nearly 700 pages of text. At a rough estimate the author cites as many cases as vol. i of Oppenheim, and the wealth of reference to literature (often in four or five languages) is to be gauged from the fact that the book has a bibliography of twenty-four pages. It may be that the less pertinacious student will turn to a smaller work by way of introduction to this 'Introduction'.

On the other hand, for the industrious student the book is a good one. It is the product of a great deal of thought and an impressive amount of research; it is up to date and it has a certain realism which will appeal to the student. To take one example, there is the confession (at p. 249) that the United States policy on recognition of Communist China may well be affected by the politicians' need to maintain popular approval at home. Another example is the author's treatment of the law of war, although his realism may perhaps go too far for some people when he says, *à propos* of air warfare, 'if a nation mobilises totally for war, it must expect that its every segment is subject to attack whether manned by civilians or by the military' (p. 629): one can suggest certain 'segments' that ought to be immune.

One difficulty which may confront students arises from the use of concepts or phrases even in the earlier parts of the book which may be incomprehensible to the beginner. The following sentences all occur in a context which does little to explain them and contains no cross-reference to later chapters which will explain them. 'However, Gentili took the *clausula rebus sic stantibus* as expounded by Alciatus (1492–1550) in the domain of Civil Law and introduced it into international law' (p. 45). 'Although the doctrine of neutrality was separated from just war tenets by later writers, recent practice in the forms, for example, of use of Icelandic bases and of collective action through the United Nations reveals a modern fusion of the two doctrines' (p. 52). 'The Dutch were particularly anxious to keep their commercial fleet busy carrying goods to belligerent countries and elaborated the rule, "free ships, free goods" ' (p. 54). 'While far from the militant nationalism of the late 19th Century, even the earlier notion of nationalism propagated by Herder contained the idea of *Volksgeist*, a concept disruptive of the Enlightenment view of humanity united in a common possession of reason' (p. 64). 'Non-recognition may prevent the law-creating effects of prescription' (p. 228). 'The inadmissibility of reservations to labour conventions may be explained by the constitutional structure of the I.L.O.' (p. 319). All these sentences, and possibly many more which escaped this reviewer's attention, contain a reference to notions which need to be made explicit before the student will appreciate their value. There is no point in disheartening the student by incomprehensible remarks, however sound the remarks may be.

The first four of these sentences occur in the second chapter which is a survey, in chronological order, of the writings of the theorists on international law. The value of some understanding of the general trend of doctrinal development is unquestioned; but one may question whether the wealth of detail in the second chapter is really in place in an elementary textbook. Is knowledge of the writings of Rymer, Moser, Bielfeld, or the Latin-Americans Bello and Seijas really necessary for this purpose?

Other comments, which are intended as suggestions rather than criticisms, are the following. This reviewer, despite *Ex parte Quirin*, still doubts whether espionage is properly characterized as a crime against international law (p. 206). The chapter on recognition could, with advantage, deal with the difference between recognition and representation in U.N. organs—a frequent source of trouble to students. The opposition between the *Salimoff* case and *Luther* v. *Sagor* is inadequately put unless some reference is made to the retroactive effect of recognition which, in the latter case, was the crux of the decision (pp. 253–4). The references to the Diplomatic Privileges (Extension) Acts of 1944, 1946, need amendment in view of the International Organizations (Immunities and Privileges) Act, 1950, and the Diplomatic Privileges (Extension) Act, 1950 (pp. 277, 410). The case of *Mortensen* v. *Peters* is apt to mislead unless reference is made to the subsequent executive and legislative action which largely nullified the effect of the decision (p. 367). In chapter 19, on 'Force and International Retribution', it might be preferable to cite Article 2 (4) of the Charter verbatim, and the *Corfu Channel* case certainly needs discussing in this connexion. At p. 622 this reviewer would like to see the statement on the *Altmark* incident, which appears derogatory of the British view, supplemented with a reference to literature putting forward the British view, for example, the article in this *Year Book* for 1947.

These comments are, however, relatively insignificant besides the general worth of the book. In general Dr. Gould's contribution to students' textbooks on this subject is an impressive one, and it should prove an excellent guide in the hands of the better student. It is, moreover, equipped with the texts of the Charter, the Uniting for Peace Resolution A, the Statute and the Rules of the International Court. It will not be Dr. Gould's fault if the student fails to learn a great deal about international law.

D. W. Bowett

Transnational Law. By Professor P. C. Jessup. Yale University Press, 1956. 113 pp. $3.

This small book contains three lectures delivered by the author at Yale Law School as the Storr Lectures of 1956. 'Transnational law', he explains, is a term used by him to include 'all law which regulates actions or events that transcend national frontiers', and to embrace not only public and private international law but also other rules which do not fit into any standard categories. The theme of the book is that while there have always been some 'transnational law' situations, for example, in conflict of laws and in the international rules concerning the treatment of aliens, today the number and variety of these situations have vastly increased as a result of the developing interdependence of states, the growth of national organizations, the expansion of international commercial activity, schemes for international assistance in the backward countries, and many other factors. In some 'transnational law' situations, such as a concession to a foreign company by the government of an underdeveloped State, or a contract of employment between an international organization and a member of its staff, the legal elements cut across the ordinary divisions between public international law, conflict of laws and municipal law. At the same time there is a measure of universality in human problems and a corresponding measure of universality in legal problems and principles. No doubt there are jurisdictional problems to be faced in finding solutions for 'transnational law' situations, and especially in connexion with the limits of extra-territorial jurisdiction. But the existing principles governing jurisdiction are confused and full of fictions and 'it would be the function of transnational law to reshuffle the cases and to deal out jurisdiction in the manner most conducive to the needs and convenience of all members of the international community'. Ultimately, the task of finding appropriate solutions for 'transnational law' situations is essentially a problem of a 'choice of law' kind, and it is the task of the scholar to explore and analyse this problem well in advance of 'the ponderous trend of governmental action'.

The book, although brief and written with the lucidity which characterizes all Professor Jessup's work, is not an easy one. It is packed with apt illustrations and cases taken from almost every conceivable branch of the law and from very various sources. These illustrations and cases achieve the author's design of stimulating the most lively reflections on possible legal developments in the new world society which is rapidly taking shape. But they lie so thick that the silver thread of Professor Jessup's theme at times vanishes like an underground stream, only to reappear a good deal farther on in the lecture. Although some readers may feel that they would have welcomed rather more guidance in following the main theme, there can be no doubt of the success of the book in focusing attention on an expanding field of legal problems where there is an urgent need for lawyers to apply, if not new legal ideas, a fresh frame of mind. Moreover, the illustrations and cases contain much interesting and even recondite material which lawyers will be grateful to Professor Jessup for having brought to their notice.

The present number of this *Year Book* itself bears testimony to the importance of the subject with which Professor Jessup deals. For not only do Lord McNair's paper on 'General Principles of Law' and Dr. Mann's paper on 'Some Aspects of International Commercial Law' deal directly with transnational problems discussed by Professor Jessup, but a number of the other papers also touch 'transnational law' situations. There is little doubt that the future will see a significant growth of law which has in it elements of international law and of municipal law, but is not to be placed exclusively in one or other classification.

C. H. M. W.

The Law of State Succession. By Dr. D. P. O'Connell. Cambridge University Press: 1956. xl+425 pp. 45*s*.

The passing of territorial sovereignty from one State to another, whether by cession, annexation, partition, union, federation or assumption of a protectorate, necessarily raises important and complex problems both in international and municipal law regarding the continuance of the legal régime which affected the territory before the change of sovereignty. The practice has grown up of referring to the principles, such as they may be, governing these questions by the compendious title of the law of State succession. The term 'State succession', as Dr. O'Connell notes, is open to some objection as really begging the crucial question whether there is any true succession in law by the new sovereign to the rights and obligations of the old. Moreover, the State practice and decisions of tribunals collected in Dr. O'Connell's book conclusively show that any theory of a definite succession to rights and obligations plays a comparatively small part in the solution of the problems arising upon a change of sovereignty. He finds it convenient, however, to retain the term 'State succession', treating it as referring only to the *factual situation* which arises when one State is substituted for another in sovereignty over a given territory. The use of the term, he says, does not necessarily presuppose 'a juridical substitution of the acquiring State in the complex rights and duties possessed by the previous sovereign'.

Previous writers on State succession have, for the most part, concentrated on one or two particular questions, such as succession to public debts or the effect of change of sovereignty on nationality. Dr. O'Connell, on the other hand, analyses in turn the position, as he sees it, in regard to each of the principal questions of 'succession' which a change of sovereignty may provoke. The great merit of the book is that it does not attempt to force the principles governing these questions into a single, preconceived theory of State succession or to find for any particular question a rule of succession where none can legitimately be derived from the existing evidence. It sets out dispassionately the relevant State practice and decisions of international and municipal tribunals for each main field of State succession leaving the rule, such as it may be, to emerge from the evidence. Theories of writers, though referred to in footnotes, are given little prominence in the body of the book. The general result is a thoroughly workmanlike textbook covering the various fields of 'State succession'.

The main body of the book is in four parts. The first deals with the effect of a change of sovereignty on the treaty relations of the territory, separate chapters being devoted to personal treaties, dispositive treaties, multilateral treaties and membership of international organizations and the extension to the territory of the treaties of the acquiring State. In this part Dr. O'Connell takes much the same general line as Lord McNair in his book on *Treaties* and Dr. Mervyn Jones in Volume 24 of this *Year Book.* The application of the doctrine of acquired rights in the circumstances of a change of sovereignty is the subject of Part 2. This part begins with a chapter setting out

Dr. O'Connell's opinions concerning the doctrine of acquired rights in international law, as to which he concludes:

> 'The doctrine of acquired rights is perhaps one of the few principles firmly established in the law of State succession, and the one which admits of least dispute. There is, as the memorandum submitted by the Secretary-General of the United Nations to the International Law Commission in 1949 suggests, no adequate measure of certainty with regard to its application to the various categories of private rights such as those grounded in the public debt, in concessionary contracts, in relation to the public service and the like. Despite this uncertainty, the assimilation of these categories of rights to the concept of acquired rights is probably the basis upon which the treatment of most of the problems of State succession may profitably be attempted.'

He then proceeds to consider in separate chapters the particular problems of economic concessions, administrative contracts, the national debt, local debts, the repartition of debts, pensions and salaries of public servants and claims unliquidated at the date of the change of sovereignty. Part 3 discusses in three chapters the effect of a change of sovereignty on the legal and administrative structure of territory absorbed into another State, the individual chapters dealing respectively with the legal and judicial organization, public property of the State and the administrative services. Part 4 contains two chapters on the problem of the nationality of inhabitants of territory absorbed into another State, the first examining the change of nationality and the second the question whether there is a right to opt for an alternative nationality.

The matters covered in the book are of great practical importance not only to States but to a wide range of individuals. On some matters the law is fairly clear; on others it is either controversial or neutral—neutral in the sense of leaving the solution to the State or States concerned. The value of the book is that in a comparatively short compass it presents a clear picture of what has been done or decided in past instances and in that way gives useful guidance even where it may not be possible to formulate definite propositions of law. The subject of State succession is extremely complex and difficult and Dr. O'Connell, by his masterly analysis of the issues and exposition of the practice, has placed all international lawyers in his debt.

The final chapter containing a brief summary of Dr. O'Connell's conclusions on the whole subject of State succession is, perhaps, a little less successful. Having steadily resisted in the main body of the book the temptation to advance any general theory of State succession, he succumbs to it wholeheartedly in this chapter:

> 'The word "equity" is the key, it is believed, to the entire problem of State succession. The closest perusal of State practice reveals that paramount in the historical controversies arising out of changes of sovereignty has been an attempt to safeguard the investments of foreign nationals in transferred territory. The starting point in a discussion of State succession is, therefore, not so much the interests of either predecessor or successor States as those of private investors.'

It may be suspected that Dr. O'Connell was here thinking rather of the particular problem of a new sovereign's obligations in regard to previously acquired rights than of 'the entire problem of State succession'. But, even if the passage is so limited, it seems to be a little too large in its focus. Naturally, the interests of foreign private investors are the starting-point, because their maintenance against the new sovereign is the very problem involved. Looked at from this point of view, the law involved is simply the law concerning the right of third States to protect the interests of their nationals in the territory concerned and more particularly interests in the form of acquired rights. There remains, however, the legal question whether rights acquired against one sovereign are equally acquired rights with respect to the new sovereign.

Dr. O'Connell deals fully and fairly with this question in the body of his book and it may be doubted whether his attempted formulations of general principle in the final chapter assist very much. The present reviewer feels a similar doubt about Dr. O'Connell's strong advocacy of the principle of unjust enrichment—unjust enrichment of the State at the expense of the foreign private investor—as the general basis of the enforcement of acquired rights against a successor State.

The book ends with a succinct and helpful 'code' of rules for the solution of the various problems of State succession, some of the rules being established legal rules and others being indicated by the solutions adopted in some important instances. There then follows an Appendix of 125 pages containing 74 selected Opinions of the Law Officers and Foreign Office memoranda which throw new light on British practice in regard to many problems of State succession. All in all, Dr. O'Connell can congratulate himself on having written a first-rate book on State succession, which is likely to become the standard book of reference on the subject.

C. H. M. W.

Diritto Internazionale. Volume I. By ANGELO PIERO SERENI. Milan: Dott. A. Giuffrè. 1956. xxxi+232 pp. Lire 1,600.

Although nothing except the title indicates it, this volume appears to be intended to form the first part of an extensive treatise on international law. In fact it is an independent introduction to the study of international law which is particularly attractive both in substance and in form.

The book is divided into four parts which deal respectively with the history of international law, the place of international law in the world community, the sources of international law and the relation between international and municipal law.

In the historical part the author has successfully avoided the danger of presenting the development of international law as a series of legal biographies or as a growing pattern of formal legal rules. Instead he treats the personal element very lightly and analyses the growth of the legal rules as part of the history of international relations. Following the thesis set out in his earlier book on *The Italian Conception of International Law* (1943), reviewed in this *Year Book*, 21 (1944), pp. 261–3, he rejects the view that the origins of international law are to be sought in the sixteenth century and rightly seeks for them in the relations between members of the Holy Roman Empire and others in the late twelfth century, but he does not enlarge on this theme which still deserves a special study. In his view the sixteenth and seventeenth centuries witnessed the decline, not the flowering, of international law, and modern international law as a system governing sovereign nations, not patrimonial states, with clearly defined frontiers, owes its fundamental concepts to the French Revolution. During the nineteenth century, in the absence of international institutions, congresses served social and humanitarian rather than political needs. He then surveys the developments during the present century and stresses the progress towards institutionalization. The author concludes this chapter with a critical discussion of modern theories of international law. He denies its exclusively voluntary character as well as the existence of a sole basic norm and suggests that there are others outside the principle *pacta sunt servanda*.

The second part is concerned with the function of international law, its subjects and objects, and the features which distinguish it from domestic law and its process of creation. The author notes that the greater part of international law is made up not of universal or general, but of particular international law with the result that the rights and duties of the limited number of members of the international community differ greatly from case to case, thus rendering analogies and generalizations difficult. At the same time he admits that international law is a complete system which does not admit the existence of *lacunae* but does admit free spheres in which the principle of effectiveness has its part to play. Finally, he issues a warning note against the application of schemes and methods which are drawn from municipal law.

The third and amplest chapter deals with the sources of international law. Rejecting the doctrine of the pure theory of law as well as that of the positivist school the author holds that the recognition of formal sources of law presupposes the existence of a legal system and of a small number of rules which determine which are the formal sources. These rules are meta-juridical and are described as constitutional or fundamental or general principles of international law. The main principles are:

(1) that international law is an autonomous system;
(2) that custom and treaties are its sources and must be observed;
(3) that effectiveness must be respected in the free sphere;
(4) that States are independent and equal;
(5) that States retain their identity, even if internal changes occur;
(6) that there are rules which determine the existence of international personality.

A certain discrepancy between the first five and the sixth rule must strike the reader, for the last has no material content. It is interesting to compare this scheme of basic rules with that recently formulated by Schwarzenberger in *Recueil des Cours*, 87 (1955, I), pp. 195–362, especially as regards the place of good faith, abuse of rights, methods of interpretation and general principles of procedure, the last of which were examined in detail by the author in his *Principi Generali di Diritto e Processo Internazionale* (1955). His view of customary law as a source of international law is orthodox; he rejects the contractual as well as the evidentiary theory and passes over Ago's doctrine of spontaneous creation. On the other hand, he attributes the character of customary law to rules bearing on international law which have found expression in municipal law only and gives considerable prominence to particular as distinct from general, customary international law and to judgments *ex aequo et bono* as sources of international law.

According to the author, customary and treaty law are not co-ordinated by a hierarchy of rules and neither public policy nor *boni mores* restrict the law making effect of treaties. The division between *jus cogens* and *jus dispositivum*, well known in municipal law, does not apply. The author's command of both common and civil-law systems makes the section on general principles of law as recognized by civilized nations particularly interesting. In substance it confirms the warning of Gutteridge in this *Year Book*, 21 (1944), p. 1, that such principles are extremely rare; the author suggests, moreover, that such principles, if found applicable in the international sphere, have either assumed or are presumed to have assumed the character of principles of international law proper or have been introduced by agreement.

The fourth and last chapter is concerned with the relation between international and municipal law. The author is a dualist, but his attempt to establish the historical foundations of the dualist doctrine in the practice of the French post-glossators requires further evidence before it can be accepted. In general his treatment of the subject follows the well-established tenets of the dualist school but the inclusion of modern problems, such as that of the incorporation of the general principles of international law in contracts between States and individuals, adds topical interest to this chapter.

The author has written a broad and yet detailed, orthodox and yet highly personal introduction to international law which is characterized by his extensive interest both in international and in comparative municipal law. But for the fact that it is written in Italian, this book would soon become the first reader for incipient students of international law.

K. Lipstein

Luftkrieg und Menschlichkeit. By Dr. Eberhard Spetzler. Göttingen: Musterschmidt-Verlag. 1956. viii+451 pp. 28 DM.

This is the twelfth study published by the International Law Institute of the University of Göttingen in its series *Göttinger Beiträge zu Gegenwartsfragen des Völkerrechts und der Internationalen Beziehungen*. The author, a jurist who during the recent war served as a General Staff Officer in the Luftwaffe, has set out to present a comprehensive and minutely documented survey of the rights and status of the civilian under the conditions of modern air warfare. This object he has substantially achieved, yet the work emerges not so much as a textbook of international law on the subject, but as an indictment, supported by a great weight of carefully observed and analysed evidence from the two world wars, of the present lack of any common international custom or practice. J. M. Spaight, in the preface to the latest edition of his *Air Power and War Rights* (at p. vii) claims that the Second World War 'left the law of the air substantially as it was after the war of 1914–18'. This new book is clearly designed to present the case for an urgent and immediate reassessment and codification of certain basic rules of air warfare in the light of the totally new problems posed by the atomic, hydrogen and cobalt weapons.

The work falls naturally into two parts; the first (pp. 25–114) consists of a commentary upon the most important international statute law from the Hague Conventions of 1899 and 1907 to the Geneva Conference of 1949. The only conclusion to be drawn from these pages, apart from the persistence of a few isolated principles, is that much of this 'legislation' rapidly became out of date and is now meaningless. The Hague principles cannot be said to apply, even by extension, to present circumstances. In the more interesting and controversial second part of the book (pp. 154–390), however, the author turns to examine in considerable detail each of the principal strategic and tactical phases of the Allied and Axis air operations during the Second World War. Although he is not always successful in keeping the legal problems clearly and cogently in the forefront of the complex military pattern Dr. Spetzler does ensure that certain themes emerge from the general discussion. Whilst he acknowledges the inchoate character of modern air law and the absence of an intelligible body of rules comparable to those limiting warfare on land or sea, he refuses to admit that, of necessity, this is a 'no-man's land' of international law. The great disparity between *Kriegsraison* and *Kriegsmanier*, reflected in the lack of any effective definition of the types of permissible violence or the legitimate objects of air attack, marks, in his view, the end of one era of war. Of particular interest here is his moderate and objective treatment of the question of 'target area' bombardment and 'morale' raids (pp. 286 et seq.); few international lawyers would deny that a complete reappraisal of the scope and region of air warfare should be a matter of immediate concern. Dr. Spetzler's constructive suggestions to this end (pp. 390–6) echo the appeal of the late Archbishop of York at the York Diocesan Conference of July 1952 in calling for the international prohibition of nuclear weapons, of napalm and obliteration bombing, and of bacteriological warfare.

Whether or not one agrees with the conclusions advanced, or with the suggested bases for a codification of air law, this book will be warmly welcomed as an important pioneering work which provides both ample material and stimulus for further study. It is persuasively written, well produced, and supported by a comprehensive bibliography and tables.

K. R. Simmonds

The Trusteeship System of the United Nations. By Charmian Edwards Toussaint. London: Stevens & Sons Ltd. 1956. xiv+288 pp. 37*s.* 6*d.*

With an excellently concise style Dr. Toussaint describes the history, the purposes and the actual functioning of the United Nations' Trusteeship System, drawing attention to the importance of and the awakening of interest in the entire subject of backward areas and non-self-governing territories. In the first of the six parts into which the book is divided, the author introduces her subject with an account of the development of thought leading to the concept of the sacred trust as an integral part of colonial government and the administration of backward areas by civilized States. Unfortunately, although the purpose of the book is clearly not to present a precise and extensive history of events preceding the formation of the United Nations, in the historical introduction in the first chapter the otherwise highly acceptable and pithy compactness, which characterizes the author's style, tends to produce a somewhat disjointed narrative and even a slight degree of ambiguity. For instance, a reference on page 7 to the attitude of the United States Government to the aboriginal inhabitants of North America, in which the aborigines are described with the unqualified word 'Indians', is momentarily confusing in view of the juxtaposition of an immediately previous allusion to the people of India.

Moreover, while the principle of the 'sacred trust' and that of the humanitarian aspect of colonialism, which form the theme of the historical introduction in the first chapter, may lend themselves to satire and cynicism, it is also possible to take too seriously some of the more pompous and exotic platitudes which, from time to time, have coloured the history of colonial administration and expansion, and in this respect brevity may convey the impression of credulity or indifference. Hence it is perhaps through an excessive economy of words that Dr. Toussaint gives the impression that she appears uncritically to accept that no motive, other than a desire to vindicate the people of India, moved the indictment of Warren Hastings, and, probably for the same reason, it almost seems as though she regards the destruction of the North American Indians as an example of the fulfilment of the principle of the sacred trust by the Government of the United States.

Altogether, the first chapter suggests that the author wished to dispense with history as quickly as possible in order to get to grips with her real subject. When she does this, at the beginning of chapter 2, Dr. Toussaint is undoubtedly on familiar ground, and the remainder of her work is both erudite and thorough, combining succinct and clear exposition with meticulous scholarship. Describing the San Francisco Conference in 1945 and the various proposals for the formation of a System of Trusteeship to replace that of the Mandates, the author provides a detailed comparison of the five drafts which were then put forward for this purpose, and thus, with a well-connected narrative revealing a carefully documented record of events supported by complete, but suitably short, footnotes, she is able to set the stage for the chapters that follow and to indicate the lines along which they will proceed. The major problems which confronted the draftsmen and the delegates at San Francisco are exposed and intricately scrutinized, though in no way is this examination cumbersome or tedious.

Due regard is given, even in this early part of the book, to the problems created by the words 'self-government or independence', used in Article 76 (*b*) of the Charter, and attention is paid to the controversial phrase of Article 79, 'states directly concerned'. Both these questions receive further consideration later in the book.

In Part Two, dealing with the scope and the aims of the Trusteeship System, Dr. Toussaint makes clear that the whole foundation of Trusteeship is voluntary—that no State can be compelled to participate in, or to subject any of its territories (even its Mandates) to, this form of administration. The peculiar problems caused by the policy of the South African Government with regard to South West Africa, and the manner in which these have been met by the General Assembly, including the two references to the International Court of Justice, are set out at length—a practical treatment of the difficulties of Trusteeship which characterizes the whole of this work, and which is, therefore, a reason in itself for welcoming it as a useful contribution to the literature of the subject.

It is in Part Three, however, entitled 'The Trust Agreements', that the difficulty of the ambiguity of the phrase 'states directly concerned' reappears. The author concludes that the meaning of these words depends in each case upon the view adopted by the State seeking to submit a territory to the Trusteeship System, although she admits that this is a pragmatic, rather than a logical, method of definition, observing also that it has not received the support of either the United Kingdom or the Soviet Union, and that it has been resorted to as a practical expedient which, in effect, has shelved but not resolved the problem. She notes, moreover, that the question is likely to recur if, and when, administering authorities seek to change the terms of the Trust Agreements by which they are bound, and she cites, for example, the developments in the Gold Coast and their effect upon Togoland. The third part of the book concludes with an enumeration of the similarities and differences by which the Strategic and the Non-Strategic Trusts may be compared and contrasted.

The fourth and fifth parts consist of an exposition of the administrative methods adopted in the Trusteeship System, including a description of the machinery of supervision, while the sixth and last part contains a comparison of the obligations devolving upon administering authorities with regard to trust territories, and those applicable to other non-self-governing territories, such as colonies or protectorates outside the System, to which the Declaration, in Article 73 of the United Nations' Charter, applies. The author stresses the distinction between the two groups of obligations and thus appropriately concludes her work, which began with an inquiry into the development of the idea of colonial responsibility, by reminding us of the fact that the Charter binds all Members of the United Nations—including the great majority of the so-called colonial powers—to observe certain standards of conduct in their government of overseas territories.

In addition to a table of cases, list of treaties and statutes, and adequate index, the appendix contains the full text of chapters xi, xii, and xiii of the United Nations' Charter, and an extensive bibliography, part of which is divided to correspond to the six divisions of the text.

Dr. Toussaint's book, which is commendably brief and clear will serve to supplement the general textbooks of international law, most of which can spare little space for an elaboration of what is rapidly becoming a subject of considerable significance. The printers and publishers are to be congratulated upon the arrangement and proportions of this neat little volume.

D. J. L. Brown

The Council of Europe: Its Structure, Functions and Achievements. By A. H. Robertson. London: Stevens & Sons Ltd. 1956. xiii+252 pp. £2. 2*s*.

This first important work in English on the Council of Europe comes from the pen of one who has already done much to promote understanding of the work of that organization through his joint editorship of the *European Yearbook* and his writings in this *Year Book*[1] and in other periodicals. Some parts of these earlier articles have been incorporated in the present volume.

Roughly the first half of the book is devoted to a discussion of the structure and procedure of the Council of Europe, largely in terms of membership in the organization, the Committee of Ministers and the Consultative Assembly. Paraphrases of the provisions of the Statute are accompanied by a glossary of terms of the practices which have been developed during the short life of the organization. In the remainder of the volume Dr. Robertson concerns himself with the political development of the Council of Europe, with its achievements with respect to economic questions, social and cultural matters, human rights and legal questions, and with the relationships of the Council with the United Nations, European organizations and other international bodies. The Statute of the Council of Europe and 'texts of a statutory character', a table of ratifications of the conventions and agreements of the Council of Europe and a guide to the publications of the organization appear as appendixes.

The somewhat arid recitals of chronology and of morphology which are prevalent in the earlier part of Dr. Robertson's book yield, as he warms to his subject, to wise appraisals in the later pages of some of the legal and political problems encountered during the life of the Council of Europe. One might indeed wish that the author had given greater scope to analysis of the constitutional and legal problems of the Council of Europe than to mere descriptive matter. This is not to say that these questions have been neglected. He has called attention to a number of devices, old and new, which have been adopted or proposed to facilitate the functioning of the Council of Europe and which might usefully be adopted by other international organizations. These range from the new process of parliamentary representation, which has now spread to a considerable number of other international entities, to such less familiar matters as the principle of 'Partial Agreements', whereby a section of the membership of the Council may agree on a course of common action with the consent but without the participation of the other members (p. 40), and as the proposal that petitions from individuals directed against States which have not recognized the competence of the Commission should be referred to the Human Rights Commission by three governments, instead of one, so that no individual government may be accused of an unfriendly act (p. 167).

Two major themes run through the volume. The first of these is the necessity of co-ordinating the activities of the various European organizations. The second is the continuing struggle between the contending forces represented, in terms of various levels of abstraction, by the Committee of Ministers and the Consultative Assembly, governments and parliamentarians, inertia and creativity. Dr. Robertson does not conceal where his sympathies lie on either score: 'It must', he writes, 'be recognised that the present practice of international administration in Europe is unduly complex and that there would be many advantages in simplification and rationalisation' (p. 208). Difficulties have been caused not only by the number and variety of European organizations but also by unclear lines of demarcation between the powers and responsibilities of the Council of Europe and of individual specialized organizations. Jurisdictional conflicts are possibly most apparent in the relationships between the Organization for European Economic Co-operation and the Council (p. 114). The solution proposed is to make the Council of Europe 'the co-ordinating agency of European organisations' or, failing this, to assign that function at the intergovernmental level to the O.E.E.C. (p. 221). Dr. Robertson is, however, clearly aware of at least some of the difficulties which lie in the way of integration, such as the conceded advantages of specialized consultation, with representation by the ministers concerned or by experts in place of the ministers of foreign affairs who meet in the Committee of Ministers (pp. 186–7), and the particular problems posed by lack of uniformity in the membership of the various European bodies (p. 187).

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[1] 27 (1950), p. 145; 28 (1951), p. 359; and 29 (1952), p. 383.

Pressure for new measures of co-operation and for greater international integration has normally been exercised, in the face of hostility from the governments represented in the Committee of Ministers, by the parliamentarians who make up the Consultative Assembly. On occasions, the Assembly has spoken with undiplomatic, but characteristically parliamentary, sharpness to the Committee of Ministers. Delay in the adoption of measures recommended for the simplification of border formalities led the Consultative Assembly to state that the Ministers' Deputies 'had been content to seek the views of government departments at home and to reproduce their well-known apologies for doing nothing' (p. 180). The Assembly has been subjected to reproaches for irresponsibility and the Committee of Ministers for inertia. But on balance, Dr. Robertson concludes, the Committee of Ministers 'is not sufficiently active and not sufficiently interested in the work of the organisation' (p. 213).

The picture which Dr. Robertson paints is of an organization somewhat unhappily combining the characteristics of an unending diplomatic conference and of a House of Lords. It must not be forgotten, however, that a number of important international organizations with functions of considerable amplitude, such as, for instance, the Central Commission of the Rhine, have developed out of just such diplomatic conferences. The high hopes of the Congress of Europe held at The Hague in 1948 concerning the creation of a 'European Union or Federation' have undoubtedly been disappointed. However, even if the narrowest view be taken of the political efficacy of the Council of Europe, it cannot be disputed that its activities as a debating society often offer a powerful stimulus to constructive activity in other circles. Hope for its future seems to lie either in the enhancement of the Council's role, not yet fully exploited, as a co-ordinator of European functional organizations, or in its being a spearhead for the resurgence of the European Movement. The Council of Europe is still in its infancy and the developments of the coming years may yet justify Dr. Robertson's qualified optimism.

R. R. Baxter

Het Internationale Recht in Nederlands Buitenlands Beleid 1840–1850. By Dr. C. W. van Santen. De Zuid-Hollandsche Boek-en-Handelsdrukkerÿ. 1955. xvi+869 pp. 37.50 Dutch Gldrs.

Attention is drawn to this important book by an official of the Netherlands Ministry of Foreign Affairs. He has taken a decade in the nineteenth-century—1840–50—and has selected from the Netherlands archives a large number of documents illustrating the application of international law by his Government during that period. The documents have not been translated but each chapter is prefaced by a synopsis in English, and the Tables of Contents are given both in Dutch and English. For instance, Recognition of States and Governments comprise 14 incidents, State Succession 2, Extradition 17, Treaties 38, *Comitas Gentium* 6, &c. If this kind of book became common the available sources of international law would be substantially enlarged. This is particularly true in the case of the archives of a country with such a long and rich legal tradition as the Netherlands. Dr. van Santen's book is not a Moore's or a Hackworth's *Digest* because it only covers one decade, but within that limit a great deal is published as the total number of pages shows. It is greatly to be hoped that the author will continue the work of which this volume is a sample, and that British, American and other lawyers will make good use of the information thus placed at their disposal.

McNair

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